No. 16-5259

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Standing Rock Sioux Tribe, *Plaintiff-Appellant*
Cheyenne River Sioux Tribe, *Intervenor-Plaintiff*

v.

U.S. Army Corps of Engineers, *Defendant-Appellee*
Dakota Access, LLC, *Intervenor- Defendant-Appellee*

On Appeal from the United States District Court for the District of Columbia
(No.: 1:16-cv-01534-JEB)

**ATTACHMENTS TO
PLAINTIFF-APPELLANT'S EMERGENCY
MOTION FOR INJUNCTION PENDING APPEAL**

ATTACHMENTS TO PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

NO.	TITLE	USDC DOCKET NO.
1.	Order [Denying Plaintiff's Motion for Preliminary Injunction] and Memorandum Opinion, dated September 9, 2016	38, 39
2.	Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, dated September 9, 2016	42-1
3.	Declaration of Dave Archambault II In Support of Motion for Preliminary Injunction	6-1
4.	Declaration of Jon Eagle, Sr. In Support of Motion for Preliminary Injunction	6-2
5.	Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction	14-1
6.	Supplemental Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction (and Exhibits 1-4), dated September 2, 2016	36
7.	Declaration of Tim Mentz, Sr. In Support of Motion for Temporary Restraining Order, dated September 4, 2016	30-1
8.	Declaration of Thomas F. King, Ph.D. In Support of Plaintiff's Motion for an Injunction Pending Appeal	42-2
9.	Letter from Reid Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Col, John W. Henderson, District Engineer, Omaha District, U.S. Army Corps of Engineers, dated March 15 2016 [Exhibit 25 to Declaration of Jan E. Hasselman In Support of Motion for Preliminary Injunction]	6-39

NO.	TITLE	USDC DOCKET NO.
10.	Letter from Reid Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Col, John W. Henderson, District Engineer, Omaha District, U.S. Army Corps of Engineers, dated May 6, 2016 [Exhibit 26 to Declaration of Jan E. Hasselman In Support of Motion for Preliminary Injunction]	6-40
11.	Letter from Richard D. Harnois, Sr. Field Archeologist, U.S. Army Corps of Engineers, Oahe Project, to Fern Swenson, Deputy State Historic Preservation Officer, North Dakota Historical Society, dated April 22, 2016 [Exhibit 29 to Declaration of Jan E. Hasselman In Support of Motion for Preliminary Injunction]	6-43
12.	Letter from Reid Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Lieutenant General Thomas P. Bostick, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, Dated May 19, 2016 [Exhibit 32 to Declaration of Jan E. Hasselman In Support of Motion for Preliminary Injunction]	6-46
13.	Letter from Reid J. Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to David Olson, U.S. Army Corps of Engineers, dated August 1, 2016 [Exhibit 50 to Declaration of Jan E. Hasselman In Support of Motion for Preliminary Injunction]	6-63
14.	Letter to David B. Olson, U.S. Army Corps of Engineers, from Reid J. Nelson, Advisory Council on Historic Preservation, dated April 18, 2011 [Exhibit 55 to Declaration of Jan E. Hasselman In Support of Plaintiff's Reply In Support of Its Motion for Preliminary Injunction]	24-2
15.	Memo re: McCullor's Review of DAPL's Cultural Resource Survey Report for MFR (July 7, 2016) [Exhibit 16 to Declaration of Martha Chieply]	21-18

ATTACHMENT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *et al.*, **Plaintiffs,** **v.** **U.S. ARMY CORPS OF ENGINEERS, *et al.*,** **Defendants.**	**Civil Action No. 16-1534 (JEB)**

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiff's Motion for a Preliminary Injunction is DENIED; and
2. Parties shall appear for the scheduled status conference on September 16, 2016, at 2:00 PM.

SO ORDERED.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: September 9, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *et al.*, **Plaintiffs,** **v.** **U.S. ARMY CORPS OF ENGINEERS, *et al.*,** **Defendants.**	**Civil Action No. 16-1534 (JEB)**

MEMORANDUM OPINION

"Since the founding of this nation, the United States' relationship with the Indian tribes has been contentious and tragic. America's expansionist impulse in its formative years led to the removal and relocation of many tribes, often by treaty but also by force." Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001). This case also features what an American Indian tribe believes is an unlawful encroachment on its heritage. More specifically, the Standing Rock Sioux Tribe has sued the United States Army Corps of Engineers to block the operation of Corps permitting for the Dakota Access Pipeline (DAPL). The Tribe fears that construction of the pipeline, which runs within half a mile of its reservation in North and South Dakota, will destroy sites of cultural and historical significance. It has now filed a Motion for Preliminary Injunction, asserting principally that the Corps flouted its duty to engage in tribal consultations under the National Historic Preservation Act (NHPA) and that irreparable harm will ensue. After digging through a substantial record on an expedited basis, the Court cannot concur. It concludes that the Corps has likely complied with the NHPA and that the Tribe has not shown it will suffer injury that would be prevented by any injunction the Court could issue. The Motion will thus be denied.

I. Background

DAPL is a domestic oil pipeline designed to move over a half-billion gallons of crude oil across four states daily. The oil enters the pipeline in North Dakota, crosses South Dakota and Iowa, and winds up in Patoka, Illinois, nearly 1,200 miles later. Although the route does not actually cross the Standing Rock reservation, it runs within a half-mile of it.

A project of this magnitude often necessitates an extensive federal appraisal and permitting process. Not so here. Domestic oil pipelines, unlike natural-gas pipelines, require no general approval from the federal government. In fact, DAPL needs almost no federal permitting of any kind because 99% of its route traverses private land.

One significant exception, however, concerns construction activities in federally regulated waters at hundreds of discrete places along the pipeline route. The Corps needed to permit this activity under the Clean Water Act or the Rivers and Harbors Act – and sometimes both. For DAPL, accordingly, it permitted these activities under a general permit known as Nationwide Permit 12. The Tribe alleges that the Corps violated multiple federal statutes in doing so, including the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). In its Complaint, the Tribe asserts that this DAPL permitting threatens its environmental and economic well-being, as well as its cultural resources.

Despite this broad lawsuit, however, the Standing Rock Sioux now seek a preliminary injunction only on the alleged violation of the NHPA. That statute encompasses sites of cultural or religious significance to Indian tribes and requires that federal agencies consult with tribes prior to issuing permits that might affect these historic resources. The Tribe claims that the

Corps did not fulfill this obligation before permitting the DAPL activities. It bears noting that the Tribe does not press its environmental claims under NEPA here. Nor does it seek a preliminary injunction to protect itself from the potential environmental harms that might arise from having the pipeline on its doorstep. Instead, it asserts only that pipeline-construction activities – specifically, the grading and clearing of land – will cause irreparable injury to historic or cultural properties of great significance.

The statutes and permitting scheme involved in this Motion are undeniably complex. The Court first sets forth the operation of the NHPA, which the Tribe asserts was violated. It next explains the Clean Water Act and the Rivers and Harbors Act, under which the Corps permitted the DAPL activities. Subsequent sections lay out the factual and legal proceedings that have taken place thus far.

A. National Historic Preservation Act

Congress enacted the NHPA in 1966 to "foster conditions under which our modern society and our historic property can exist in productive harmony." 54 U.S.C. § 300101(1). To this end, Section 106 of the Act requires a federal agency to consider the effect of its "undertakings" on property of historical significance, which includes property of cultural or religious significance to Indian tribes. Id. §§ 306108, 302706(b). An undertaking is defined broadly to include any "project, activity, or program" that requires a federal permit. Id. § 300320. Section 106, like the National Environmental Policy Act, is often described as a "stop, look, and listen" provision. See Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166 (1st Cir. 2003) (quoting Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999) (*per curiam*)). The agency must also give the Advisory Council on Historic Protection, which is charged with passing regulations to govern the implementation of

Section 106, "a reasonable opportunity to comment on the undertaking." 54 U.S.C. § 306108. The agency must further consult with, *inter alia*, tribes "that attach religious or cultural significance to [affected] property." Id. § 302706(b). Once this is done, Section 106 is satisfied. In other words, the provision does not mandate that the permitting agency take any particular preservation measures to protect these resources. See CTIA-Wireless Ass'n v. FCC, 466 F.3d 105, 106-07 (D.C. Cir. 2006) (citing Davis v. Latschar, 202 F.3d 359, 370 (D.C. Cir. 2000)).

The Advisory Council also promulgates the regulations necessary to implement Section 106, see 54 U.S.C. § 304108(a), and these regulations "command substantial judicial deference." McMillan Park Comm. v. Nat'l Capital Planning Comm'n, 968 F.2d 1283, 1288 (D.C. Cir. 1992). Under them, the permitting agency – here, the Corps – first determines "whether the proposed Federal action is an undertaking . . . and, if so, whether it is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). Where the agency decides either that there is no undertaking or that the undertaking is not the "type of activity" that has the "potential to cause effects on historic properties, assuming such . . . properties were present," the Section 106 process is complete. Id. § 800.3(a)(1). No consultation happens and the permit may issue. Id.

Things get more complicated where the agency cannot make this determination. In such a situation, the agency must complete a multi-step "consultation" process before it permits the undertaking. Id. § 800.16(f). Indian tribes that "attach religious and cultural significance to historic properties" that may be affected by the "undertaking" are a consulting party in this process even when the properties are located outside reservation lands. Id. § 800.2(a)(4), (c)(2)(ii). The regulations in fact instruct agencies to recognize that property of importance to Indian tribes is "frequently" located on "ancestral, aboriginal, or ceded lands." Id.

§ 800.2(c)(2)(ii)(D). Once its interests are implicated, the affected tribe must be given a reasonable opportunity: "to identify its concerns about [these] properties"; to "advise on the identification and evaluation of" them; to "articulate its views on the undertaking's effects"; and to "participate in the resolution of adverse effects." Id. § 800.2(c)(2)(ii)(A). The agency is further directed to conduct these consultations "early in the planning process," id., in a "sensitive manner respectful of tribal sovereignty," and recognizing "the government-to-government relationship between the Federal Government and Indian tribes." Id. § 800.2(c)(2)(ii)(B)-(C).

The regulations then put meat on these aspirational bones by laying out the step-by-step consultative process that must occur. The process begins with initial planning, where the agency "determine[s] the appropriate SHPO . . . to be involved." Id. § 800.3(c). The State Historic Preservation Officer – *viz.*, SHPO – is designated by the governor of the state to, *inter alia*, administer this national historic-preservation program at the state level. In consultation with this Officer, an agency official then "identif[ies] any other parties entitled to be consulting parties and invite[s] them to participate." Id. § 800.3(f).

Such parties then assist the agency to identify potential historic properties in the first phase. The permitting official, along with the SHPO, initially "[d]etermine[s] and document[s] the area of potential effects," "[r]eview[s] existing information on historic properties within the area of potential effects," "[s]eek[s] information, as appropriate, from consulting parties," and "[g]ather[s] information from any [consulting] tribe . . . to assist in identifying properties" of potential significance to them. Id. § 800.4(a). Based on this information, the agency then "shall take the steps necessary to identify historic properties within the area of potential effects." Id. § 800.4(b). This identification effort extends to the "geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." Id. § 800.16(d) (defining "area[s] of potential effects"). The scope of this area is also "influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." Id. In this area, the official, through consultations, must "make a reasonable and good faith effort," "which may include background research, consultation, oral history interviews, sample field investigation, and field survey" to identify potential historic properties. Id. § 800.4(b)(1) (emphasis added). In deciding on the "[l]evel of effort" required, the official "take[s] into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." Id.

Once the potentially relevant historic sites are identified, the official moves on to evaluating the historical significance of these sites in consultation with the SHPO and tribes. Id. § 800.4(c). This step must be taken in a manner that recognizes that the tribes "possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." Id. § 800.4(c)(1). Nevertheless, where the agency official and SHPO agree that an identified property should not be considered eligible for listing on the National Register of Historic Places, "the property shall be considered not eligible." Id. § 800.4(c)(2). The permitting agency may then decide at this stage "that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them," document this finding, and notify all consulting parties. Id. § 800.4(d)(1). If neither the SHPO nor the Advisory Council (if it has entered the consultation) "object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under Section 106 are fulfilled." Id. § 800.4(d)(1)(i).

The agency otherwise proceeds to a third stage: assessment of the adverse effects on the identified historic properties. Id. § 800.5(a). An effect is considered adverse when the undertaking may "alter, directly or indirectly, any of the characteristics of a historic property that qualify it for inclusion in the National Register," including via the "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." Id. § 800.5(a)(1), (2)(v). At this point, the agency may determine in consultation with the other parties that there is no qualifying adverse effect or impose modifications or conditions that lead to the same result. Id. § 800.5(b). Alternatively, the Section 106 process may proceed to a fourth and final stage involving resolution of the adverse effects in consultation with the other parties. Id. § 800.6. The agency may, however, terminate this final consultation if it becomes unproductive and then proceed to permit the undertaking despite the effects. Id. § 800.7(a).

A few important global rules also apply to each stage of this process. The permitting agency is empowered to "coordinate the steps of the Section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under" other statutes. Id. § 800.3(b). The agency may also "use the services of applicants [or] consultants" to prepare required "information, analyses, and recommendations" in making any of the various determinations. Id. § 800.2(a)(3). Finally, the regulations allow agencies to "develop procedures to implement Section 106 and substitute them" for its procedures where the Advisory Council determines "they are consistent with the Council's regulations." Id. § 800.14(a).

B. Clean Water Act

The CWA makes it unlawful to discharge dredged or fill material into navigable waters without a permit issued by the Corps. See 33 U.S.C. §§ 1311(a), 1342(a). The Corps grants this approval in one of two ways: It issues individual permits for a specific action, id. § 1344(a), or it promulgates general permits that preauthorize a certain type of activity within a defined area. Id. § 1344(e)(1); see Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 38-40 (D.C. Cir. 2015).

General permitting has obvious advantages over individual permitting. Most notably, general permits provide standing authority for an entire category of activities where those activities, alone and together, have minimal impact on regulated waters. See Sierra Club, 803 F.3d at 38-40; see also 33 U.S.C. § 1344(e)(1). They consequently eliminate the need for an arduous permit process for each minor action affecting a U.S. waterway. Indeed, a permittee may typically rely on the general permit without even notifying the Corps of its covered activity. See 33 C.F.R. § 330.1(e)(1). To keep things rolling, the Corps need only issue the permit through public notice and comment every five years. See 33 U.S.C. § 1344(e)(2).

But not every activity covered by a general permit receives this hands-off treatment. Actions proceeding under nationwide general permits also must comply with what are known as General Conditions. These GCs sometimes require that a particular covered action be subject to pre-construction notice and verification (PCN) by the Corps before the work begins. Where a discrete action requires a PCN, a Corps district engineer must confirm that the activity will comply with the general permit, cause no more than minimal adverse effects to the environment, and serve the public interest. See 33 C.F.R. §§ 330.1(e)(2)-(3), 330.6(a)(3)(i). In so doing, the district engineer may supplement the permit's basic rules with more project-specific ones or even compel a more rigorous individual permitting process for that particular work. Id. § 330.6(a)(2), (d).

The Corps here relies on one such general permit – Nationwide Permit 12 – to authorize "the construction, maintenance, repair, and removal" of pipelines throughout the nation, where the activity will affect no more than a half-acre of regulated waters at any single water crossing. See Reissuance of Nationwide Permits (NWP 12), 77 Fed Reg. 10,184, 10,271 (Feb. 12, 2012); see also Sierra Club, Inc. v. Bostick, 787 F.3d 1043, 1056 (10th Cir. 2015). Each stand-alone crossing of a waterway is considered to be a "single and complete project" for these purposes. See 33 C.F.R. § 330.2(i). Most pipeline work that involves minor activities in U.S. waters – *i.e.*, affecting no more than half an acre – can thus proceed without any advance notice to the Corps.

Work that implicates tribal interests, however, cannot receive this *laissez-faire* handling. For example, GC 17 – not at issue here – prohibits the sanctioning of any activity under NWP 12 that will impair reserved tribal rights, including reserved water rights. See NWP 12 at 10,283. Of more relevance, GC 20 mandates a PCN for any permitted activity that "may have the potential to cause effects to any historic properties . . . including previously unidentified properties" of cultural or religious importance to a tribe. Id. at 10,284. This includes activities that may cause only "visual or noise" effects to historic properties outside the project area or reserved tribal lands. Id. at 10,251. Before such an activity can proceed, a district engineer must verify either (1) that it will not actually affect any identified historic site or (2) that the tribal consultations required by the NHPA are complete. Id. at 10,284. And, should a sanctioned activity nevertheless stumble upon tribal artifacts or remains, GC 21 mandates that the permittee "immediately notify" the Corps and, to the maximum extent possible, halt "construction activities that may affect" these objects until coordination with state, tribal, and federal authorities is complete. Id.

NWP 12 also allows a district engineer to impose additional Regional Conditions where the district engineer deems the General Conditions insufficient to protect tribal interests. See ECF No. 6, Exh. 1 (Decision Document for NWP 12) at 10; see also 33 C.F.R. § 330.5(b)(2)(ii). Many of these Regional Conditions restrict the scope of the Permit or expand the types of activities requiring a PCN process before an activity may proceed under it. See, e.g., ECF No. 21, Exh. 3 (2012 NWP Regional Conditions for North Dakota). Of particular relevance to this Motion, North Dakota's Regional Conditions require a PCN "prior to initiating any regulated activity in the Missouri River." Id. at 1. Permittees also must notify the Corps of "the location of any borrow site that will be used in conjunction with the construction of the authorized activity so that the Corps may evaluate the site for potential impacts to . . . historic properties." Id. at 2.

The Corps' more general permitting regulations further purport to assure that, in the "processing and evaluating of [any] permit," a district engineer give "maximum consideration [to] historic properties within the time and jurisdictional constraints of the Corps regulatory program." 33 C.F.R. pt. 325, app. C, § 2(f). Appendix C of these regulations addresses the Corps' NHPA obligations and requires a district engineer to "take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S." Id. § 2(a). The Corps considers each permitted water crossing of a linear pipeline, however, to be its own individual undertaking because the rest of the project – *i.e.*, the entire line – "almost alway[s] can be undertaken without Corps authorization" of such individual crossing by a feasible reroute. Id. § 1(g)(4)(i). In other words, the Corps does not consider each crossing to be the "but for" cause of the entire pipeline and thus does not consider the entire pipeline to be an undertaking. Instead, the permitted undertaking, according to the Corps, "extend[s] in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated." Id. § 1(g)(4)(ii). For these permitted actions, the district engineer must "encourage the consideration of historic properties at the earliest practical time in [a] planning process" and engage in consultations with tribal leaders, the Advisory Council on Historic Preservation, and State Historic Preservation Officers. Id. § 2(e). The regulations also specify when additional conditions should be placed on a permit to "avoid or reduce" effects to these properties. Id. § 10(a).

C. Rivers and Harbors Act

The RHA forbids certain construction activities within the "navigable water of the United States" without prior permission from the Corps. See 33 U.S.C. § 403. The Corps often relies on NWP 12 to discharge this duty for pipeline construction having only a minimal impact on regulated waters, 33 C.F.R. § 322.3(a), and the same general CWA conditions apply here. Lake Oahe is one of the waterways that falls under the jurisdiction of this Act.

* * *

To sum up, the NHPA requires that the Corps, prior to issuing a permit under the CWA or the RHA, consider the potential effect of that permitted activity on places of cultural or religious significance to Indian tribes.

D. Factual History

The Standing Rock Sioux Tribe is a federally recognized American Indian Tribe with a reservation spanning the border between North and South Dakota. See ECF No. 1 (Complaint), ¶ 1. The sweep of the Tribe's historic and cultural connection to the Great Plains, however, extends beyond these modern reservation boundaries. Id., ¶¶ 7-8. A successor to the Great Sioux Nation, the Tribe's ancestors once lived, loved, worshipped, and mourned "[w]herever the buffalo roamed." ECF No. 6-2 (Declaration of Jon Eagle, Sr.), ¶ 24. These people created stone alignments, burial cairns, and other rock features throughout the area to conduct important spiritual rituals related to the rhythms of their daily life. See ECF No. 14-1 (Declaration of Tim Mentz, Sr.), ¶ 3; Eagle Decl., ¶¶ 20, 25. Along the region's waterways in particular, the prevalence of these artifacts reflects water's sacred role in their deeply held spiritual beliefs. See Eagle Decl., ¶ 25. Today, the Standing Rock Sioux continue to honor these practices and cherish the connection they have to their ancestors through these sites. Id.

One place of particular significance to the Tribe lies at the traditional confluence of the Missouri and Cannonball Rivers. Id., ¶¶ 11-12; ECF No. 6-1 (Declaration of Dave Archambault II), ¶ 12. The ancestors to the Standing Rock Sioux gathered in this location to peacefully trade with other tribes. See Mentz Decl., ¶ 36. They also considered the perfectly round stones shaped by the meeting of these two great rivers to be sacred. See Eagle Decl., ¶ 11. Mighty natural forces, however, no longer hone these stones. Id. In 1958, the Corps dredged and altered the course of the Cannonball River to construct a dam. Id. As a result, a large man-made lake known as Lake Oahe now covers the confluence. Id.

The Tribe nevertheless continues to use the banks of the Missouri River for spiritual ceremonies, and the River, as well as Lake Oahe, plays an integral role in the life and recreation of those living on the reservation. Id. Naturally, then, the Tribe was troubled to learn in late 2014 that a new pipeline was being planned that would cross the Missouri River under Lake Oahe about a half-mile north of the reservation. See Archambault Decl., ¶¶ 8-12. This was, of course, DAPL – a 1,172-mile crude-oil pipeline poised to wind its way from the Bakken oil fields near Stanley, North Dakota, to refineries and terminals in Patoka, Illinois.

The conflict that has arisen since this revelation is, to say the least, factually complex. To ease digestion of the relevant information, the Court first describes how Dakota Access chose the pipeline route. It then lays out the facts surrounding the Corps' permitting and concurrent Section 106 process for the project. These following summaries admittedly contain significant detail and may try the reader's patience. The Court nonetheless believes such a narrative is necessary because a key question here is whether the Corps engaged in sufficient consultation with the Tribe under Section 106.

1. *DAPL*

In the summer of 2014, Dakota Access crafted the route that brought DAPL to Standing Rock's doorstep. See ECF No. 22, Exh. B (Declaration of Monica Howard), ¶¶ 2-3. The plotted course almost exclusively tracked privately held lands and, in sensitive places like Lake Oahe, already-existing utility lines. As only 3% of the work needed to build the pipeline would ever require federal approval of any kind and only 1% of the pipeline was set to affect U.S. waterways, the pipeline could proceed largely on the company's timeline.

Dakota Access nevertheless also prominently considered another factor in crafting its route: the potential presence of historic properties. Id. Using past cultural surveys, the company devised DAPL's route to account for and avoid sites that had already been identified as potentially eligible for or listed on the National Register of Historic Places. Id., ¶¶ 2-4. With that path in hand, in July 2014, the company purchased rights to a 400-foot corridor along its preliminary route to conduct extensive new cultural surveys of its own. Id., ¶ 3. These surveys eventually covered the entire length of the pipeline in North and South Dakota, and much of

Iowa and Illinois. Id., ¶ 8. Professionally licensed archaeologists conducted Class II cultural surveys, which are "focused on visual reconnaissance of the ground surface in settings with high ground visibility." Id. In some places, however, the same archaeologists carried out more intensive Class III cultural surveys, which involve a "comprehensive archaeological survey program" requiring both surface visual inspection and shovel-test probes of fixed grids to "inventory, delineate, and assess" historic sites. Id. These latter surveys required coordination with and approval by State Historic Preservation Officers. Id.

Where this surveying revealed previously unidentified historic or cultural resources that might be affected, the company mostly chose to reroute. Id., ¶¶ 4-6. In North Dakota, for example, the cultural surveys found 149 potentially eligible sites, 91 of which had stone features. Id., ¶ 5. The pipeline workspace and route was modified to avoid all 91 of these stone features and all but 9 of the other potentially eligible sites. Id. By the time the company finally settled on a construction path, then, the pipeline route had been modified 140 times in North Dakota alone to avoid potential cultural resources. Id., ¶ 6. Plans had also been put in place to mitigate any effects on the other 9 sites through coordination with the North Dakota SHPO. Id., ¶ 13. All told, the company surveyed nearly twice as many miles in North Dakota as the 357 miles that would eventually be used for the pipeline. Id., ¶ 12.

The company also opted to build its new pipeline along well-trodden ground wherever feasible. See ECF No. 22-1 (Declaration of Joey Mahmoud), ¶¶ 18, 24, 40. Around Lake Oahe, for example, the pipeline will track both the Northern Border Gas Pipeline, which was placed into service in 1982, and an existing overhead utility line. Id., ¶ 18. In fact, where it crosses Lake Oahe, DAPL is 100% adjacent to, and within 22 to 300 feet from, the existing pipeline. Id. Dakota Access chose this route because these locations had "been disturbed in the past – both above and below ground level – making it a 'brownfield crossing location.'" Id., ¶ 19. This made it less likely, then, that new ground disturbances would harm intact cultural or tribal features. Id.

Around the time the cultural survey work began, Dakota Access took its plan public. See Howard Decl., ¶ 12. On September 30, 2014, it met with the Standing Rock Sioux Tribal Council to present the pipeline project as part of a larger community-outreach effort. Id., ¶ 22. Personnel from Dakota Access also spoke with the Tribe's Historic Preservation Officer (THPO), Waste' Win Young, several times over the course of the next month. Id., ¶¶ 23-27. At one related meeting, a DAPL archaeologist answered questions about the proposed survey work and invited input from Young on any areas that might be of particular tribal interest. Id., ¶¶ 25-28. The company agreed as well to send the centerline files from its cultural survey to her for review, and did so on November 13. Id., ¶ 28. It never received any response from Young. Id.

2. *Entry of Corps*

Based on the current record, the Corps appears to have had little involvement in Dakota Access's early planning. The one exception is a June 2014 meeting between the two parties to discuss the company's plan to build a pipeline through the region. See ECF No. 21-18 (Declaration of Martha Chieply), ¶ 8. At this meeting, the Corps informed the company about its permitting requirements and explained the importance of tribal coordination for any actions taken under its jurisdiction. Id. There is no indication that the company sought to secure any permitting or that it presented the Corps with a specific proposed route for DAPL at this time. Id. This conclusion is consistent with the record evidence that Dakota Access was still buying up the necessary right-of-ways for the pipeline surveys in July 2014. See Howard Decl., ¶ 3; Mahmoud Decl., ¶ 40.

The writing was on the wall, however, that many DAPL permitting requests would eventually land in the Corps inbox. The Corps' Tribal Liaison, Joel Ames, accordingly, tried to set up a meeting with THPO Young beginning around September 17, 2014, without success. See ECF No. 21-17 (Declaration of Joel Ames), ¶¶ 5-6; see also ECF No. 21, Exh. 9 (Corps Tribal Consultation Spreadsheet) at 1 (documenting five attempts by Ames to coordinate a meeting with Young in September 2014). On October 2, other Corps personnel also sought to hold an arranged meeting with the Tribal Council and Dakota Access on the Standing Rock reservation. See Chieply Decl., ¶ 9. But when the Corps timely arrived for the meeting, Tribal Chairman David Archambault told them that the conclave had started earlier than planned and had already ended. Id. Ames nevertheless continued to reach out to Young to try to schedule another meeting throughout the month of October. See Ames Decl., ¶¶ 5-6. When the new meeting was finally held at the reservation on November 6, though, DAPL was taken off the agenda because Young did not attend. Id., ¶ 7.

3. *Soil-Bore Testing at Lake Oahe*

The Corps' North Dakota office also received the first request for DAPL permitting around this time and launched a formal NHPA Section 106 consultation as a result. See ECF No. 21-19 (Declaration of Richard Harnois), ¶ 5. This solitary preconstruction request from Dakota Access sought permitting only to conduct preliminary soil-bore testing at the Lake Oahe site, not to actually begin any construction. Id., ¶ 12. Dakota Access needed to conduct these tests to determine whether it could subsequently use its preferred method of Horizontal Directional Drilling at the crossing. Id. HDD – which the company plans to use on all land subject to the RHA or owned by the Corps – allows for "construction across a sensitive area without excavation of a trench by installing the pipeline through a drilled hole significantly below the conventional depth of a pipeline." Howard Decl., ¶ 7. This particular test involved drilling just seven holes of 4-inch diameter with an estimated 10 feet of impact on areas around the holes. See Harnois Decl., Exhs. 1-2. Access to and from the sites, moreover, would take place on existing roads. Id.

As a first cut, the Corps reviewed extensive existing cultural surveys both within and outside the Lake Oahe project area to determine whether the work might affect cultural resources. Id. Then, on October 24, the Corps sent out a letter to tribes, including the Standing Rock Sioux, with information about the proposed work and maps documenting the known cultural sites that the Corps had already identified. Id., ¶ 6; see id., Exh. 1. These included sites that the Corps considered to be outside the projected area of effect. Id., ¶ 6. In addition, the letter requested that any party interested in consulting on the matter reply within thirty days. Id. No response was received from the Tribe. Id. The Corps did receive responses from other tribes and the North Dakota SHPO, which it considered. Id., ¶ 7. After granting an extra three weeks for additional responses, on December 18 the Corps made an initial determination of "No Historic Properties Affected" for the soil-bore testing. Id., ¶¶ 7-11.

The Corps mailed out this decision in a Determination of Effect letter to the North Dakota SHPO and all affected tribes on the same day. Id., ¶ 11. The letter explained that the Corps had concluded that no historic properties would be affected by the tests and clarified that a previous "not eligible" determination had already been made for a nearby site that would also not be affected by the work. Id. The Corps also emailed Young again the next day to seek possible dates for a January 2015 meeting with the Tribe to discuss DAPL. See Tribal Consultation Sheet at 1 (documenting email on December 19, 2014). No response is in the record.

On February 12, 2015, having still heard nothing from the Tribe, Corps Senior Field Archaeologist Richard Harnois emailed Young again to solicit comments on the narrow issue of the soil-bore testing. See Harnois Decl., ¶¶ 13-14. Again, no reply. Id. Around this same time, Young informed the Corps' Tribal Liaison, Ames, at an unrelated regulatory meeting that she did not need to consult with the Corps at the moment as she was currently working directly with Dakota Access. See Ames Decl., ¶ 8; see also Tribal Consultation Sheet at 1 (documenting contact). As a result, on February 18, the Corps granted the PCN authorization under NWP 12 for the limited exploratory soil-bore testing requested by Dakota Access. See Harnois Decl., ¶¶ 13-14.

At this point, the Court should note that the Tribe has not provided a declaration from Young about any of these early consultations (or lack thereof). This omission is problematic for its cause because many of the facts relevant to the Tribe's NHPA claim involve her. As a result, the rendition of the facts in the record is largely told through documentation and affidavits provided by the Corps, with the exception of letters from Young provided by the Tribe.

In any event, several weeks later, on March 2, 2015, the Corps finally received a letter from Young expressing concerns over sites that might be affected by the bore testing. Id., ¶ 15. The letter was dated on the same day that the Corps had green-lighted the work. Id. In particular, Young mentioned the North Cannonball Village Site, which was almost a half-mile from the closest "area of potential effect" boundary set by the Corps. Id. The letter further requested Class III and other cultural surveys under tribal monitoring before the testing, and tribal monitoring during both the testing and any later pipeline construction. Id. Young also sent a similar letter on February 25 to the Corps' Regulatory Branch Chief, Martha Chieply. See ECF No. 6, Exh. 6 (Letter from Young to Chieply on Feb. 25, 2015).

Neither of these letters, contrary to representations made in the Tribe's Motion, appears to be an "immediate[]" response to a February invitation by the Corps to consult on PCNs related to the actual pipeline construction. See Mot. at 10; see also Letter from Young to Chieply (Feb. 25, 2015). Indeed, the letters make no mention of that February offer, focusing instead on the more narrow issue of the soil-bore testing. See Letter from Young to Chieply on Feb. 25, 2015. Of course, as the Court has explained, the Corps had already permitted that limited testing under NWP 12 by the time Young sent the letters. Ames nevertheless renewed his efforts to schedule a meeting between Chairman Archambault and the Corps' North Dakota District Commander, Colonel Henderson, in response to Young's letters, but the parties could not find a date when both men were available to consult. See Ames Decl., ¶ 9.

4. *PCN Authorizations*

In the meantime, Dakota Access initiated efforts on December 29, 2014, to secure five additional PCN authorizations under NWP 12 for pipeline-construction work in North Dakota. See Chieply Decl., ¶ 10. (Out of these, three were later withdrawn for various reasons. Id.) In the application, the company provided a project description, a water- and wetland-delineation report, and a cultural-survey report for areas around the PCN sites. Id., Exh. 4 at 1, 8. Dakota Access also requested a jurisdictional determination from the Corps for the work. Id., Exh. 4 at 1. On February 5, 2015, the Corps deemed the application incomplete and informed the company that it would require additional information before considering it. Id., ¶ 11. At this time, the Corps also informed Dakota Access that one of the listed sites, PCN # 1, would not require Corps permitting because the involved waterway had previously been determined to be an isolated waterway not subject to the CWA or RHA. Id., ¶¶ 10-11. Dakota Access responded with a complete application for the remaining PCNs on March 25. See id., ¶ 13. The Corps, accordingly, sent a letter in relation to an environmental assessment (EA) for the project to the Tribe and other parties on March 30. See ECF No. 21-20 (Declaration of Jonathan Shelman), ¶ 7. This letter described the two proposed crossings at Lake Sakakawea and the proposed crossing at Lake Oahe – *i.e.*, the three North Dakota sites still thought to require PCNs at the time – and solicited comments from the Tribe to be considered as part of the EA. Id.

While discussions between Dakota Access and the Corps were ongoing, the Corps also sent a form letter to Young on February 17, informing her that it was now considering 55 PCN requests across its offices for DAPL. See ECF No. 6, Exh. 5. The letter went on to explain that the majority of the pipeline work would occur in uplands that were not subject to Corps jurisdiction, but the Corps would need to permit crossings at the Missouri, James, Big Sioux, Des Moines, Mississippi, and Illinois Rivers. Id. The letter, moreover, noted that Dakota Access was conducting cultural surveys along the entire route. Id. Finally, the Corps requested that the Tribe let it "know if you have any knowledge or concerns regarding cultural resources . . . you would like the Corps to consider" and asked whether it wanted to consult on the project. Id. A response was requested prior to March 30 "to help facilitate a timely Section 106 review." Id. The Corps also attached the current proposed alignment provided by Dakota Access for the pipeline and contact information for various Corps staff involved in facilitating tribal consultations. Id.

On the date of the deadline to respond, Ames and Young exchanged emails, but the content of this exchange is not in the record. See Tribal Consultation Sheet at 8. Young did, however, formally respond on April 8. See ECF No. 6, Exh. 7. In her response this time, she acknowledged receipt of the Corps' February 17 letter about the 55 construction-related PCNs. Id. at 1. But the thrust of her letter focused again on the Corps' failure to respond, prior to permitting the soil-bore testing, to the concerns she had raised about that work. See id. at 1-2. She further expressed her belief that the Corps' inaction violated the Section 106 process. Id. at 2. She demanded that the Corps "clarify the proper sequencing of the Section 106 NHPA process" before proceeding with the EA, asserted that she had not yet been contacted by Ames, and described the placement of bore pits on private lands as an attempt to avoid federal jurisdiction. Id. at 2-3. In conclusion, Young informed the Corps that the Tribe opposed "any kind of oil pipeline construction through our ancestral lands," in part because the potential dredging would take place where "human remains of relatives of current . . . tribal members" were present. Id. at 3. Young ultimately closed, though, by reiterating that the Tribe "look[ed] forward to participation in a full tribal consultation process" once it commenced. Id. On the same day, Corps personnel and Standing Rock Archaeologist Dr. Kelly Morgan discussed future pipeline realignments over the phone. See Tribal Consultation Sheet at 7.

5. *Summer of 2015*

Relations between the Tribe and Corps did not improve in the summer of 2015. Ames attempted to speak with Young about the project in June, but she informed him via email that she was on an extended leave of absence until July 27. Id. at 8; see Ames Decl., ¶ 9. Ames was unable to determine whether anyone was empowered to act on the Tribe's behalf in her absence. See Ames Decl., ¶ 9. On July 22, Corps Operations Manager Eric Stasch also sent a letter to Standing Rock describing the planned use of HDD for the Oahe crossing. See Harnois Decl., ¶ 16; see also id., Exh. 3. In his letter, Stasch provided details about the areas of potential effects and explained that the Corps would consider the work a federal undertaking despite its location on private land. See id., Exh. 3 at 1-2. The letter went on to say that Dakota Access's cultural surveys had identified an additional cultural site within the proposed preparation and staging area for this work. Id. at 2. Finally, the letter requested a response within thirty days if the Tribe wished to consult on this particular crossing and indicated that consultations about other pipeline crossings would happen separately. Id. at 2-3. Attached to the letter were current and previous survey information, as well as general and detailed project maps illustrating the location and nature of the Lake Oahe crossing and recorded cultural resources. See Harnois Decl., ¶ 16.

In August, the Tribe responded with two letters of its own. See ECF No. 6, Exhs. 8 (Letter from Archambault to Cross on Aug. 19, 2015), 9 (Letter from Young to Stasch on Aug. 21, 2015). The first, sent on August 19 from Chairman Archambault to Colonel Cross – the Corps' Commander and District Engineer for the Omaha District – described the Chairman's frustration in not being contacted earlier in regard to DAPL. See Letter from Archambault to Cross (Aug. 19, 2015). Archambault invited Cross to the reservation to discuss the matter and provided contact information for his administrative assistant to arrange the visit. Id. The very same day, Ames emailed Archambault's assistant in an attempt to schedule a meeting, but without success. See Ames Decl., ¶ 10; see also Tribal Consultation Sheet at 8. The second letter responded directly to Stasch's offer to consult on the Lake Oahe crossing. See Letter from Young to Stasch (Aug. 21, 2015). In it, Young again reiterated that the Section 106 consultation run by the Corps had failed to respond to concerns raised by the Tribe in their February letters about the soil-bore testing prior to the completion of that work. Id. She further expressed her frustration in being excluded from the Dakota Access surveying despite company promises to include tribal monitors, and she reiterated her concern that sites might be overlooked or damaged unless the Standing Rock Sioux participated in surveying. Id. In closing, Young again said the Tribe looked forward to participating in "future consultation prior to any work being completed . . . [and] to playing a primary role in any and all survey work and monitoring." Id. at 2.

The Corps responded in at least three ways to the Tribe over the next month. First, on August 27, a Corps staff archaeologist started planning an onsite visit for the Corps, the Tribe, and the North Dakota SHPO to Lake Oahe. See Harnois Decl, ¶ 18. Second, the Corps' District Commander, Colonel Henderson, wrote back to Chairman Archambault. See ECF No. 6, Exh. 10 (Letter from Henderson to Archambault on Sept. 3, 2015). Most of Henderson's letter reiterated the form offer to consult and other general project information, but the letter also acknowledged receipt of the Tribe's recent letters and provided additional information about the requested PCN locations. Id. at 2. Third, Stasch sent a letter on September 16, expressing his willingness and desire to address the Tribe's questions and concerns during the upcoming onsite visit to Lake Oahe planned by the Corps. See Harnois Decl., ¶ 22.

On the same day as Stasch's letter, Harnois also emailed Standing Rock Archaeologist Morgan to invite her to participate in the "working level, on-the-ground site visit of the proposed DAPL Oahe Crossing." Id., ¶ 23. This sparked an email exchange between the two on logistics and dates. Id. The very next day, however, Morgan emailed the Corps to back out of the visit. Id., Exh. 4. In an attached letter, she explained that "after careful consideration the [Standing Rock] THPO has determined that it is in the best interest of the THPO to decline participation in the site visits and walking the project corridor's [area of projected effects] at this time until government-to-government consultation has occurred for this project per Section 106 requirements as requested by the Standing Rock Sioux Tribe." Id. By this she seemed to mean that the Corps needed to first hold the previously requested meeting between Chairman Archambault and Colonel Henderson. Id. Despite the Tribe's withdrawal, the Corps ultimately proceeded to hold the onsite visit with the North Dakota SHPO. See Harnois Decl., ¶ 26.

About a week later, the Tribe sent another letter, this time from Young to Colonel Henderson. See ECF No. 6, Exh. 11 (Letter from Young to Henderson on Sept. 28, 2015). In this letter, Young noted her concern "about the lack of consultation prior to the start of archaeological surveys." Id. at 1. She further indicated that the Tribe had "received no correspondence prior to the soil bore hole testing," which she then characterized as evidence that "the Corps is attempting to circumvent the Section 106 process." Id. Citing the potential for "irreparable damage to . . . known sites," she complained about the Tribe's "exclusion of tribal participation up to this point" from the identification efforts and Section 106 process. Id. In addition, she indicated that the Tribe believed "the entire length of the DAPL [is] one project under the . . . [RHA], as well as" the CWA, and that the Corps was trying to avoid "federalization." Id. at 2.

6. *Fall of 2015*

In the fall, the Corps responded by redoubling its efforts to meet with the Tribe. On September 29, 2015, Ames, in a phone conversation with Chairman Archambault, scheduled a meeting between the Corps and the Tribe's Vice Chair for October 28. See Ames Decl., ¶ 13. But two days before that meeting, the Tribe canceled "because nobody from the tribe was available to attend." Id. On the same day, the Tribe also canceled a meeting scheduled for November with Colonel Henderson, promising to meet with him instead "in a few months." Id., ¶ 14. The Corps, moreover, documented ten different attempts to contact the Tribe over the course of the October to speak about the project. See Tribal Consultation Sheet at 14.

Then, in November, the Corps twice invited the Tribe to a general tribal meeting in Sioux Falls, South Dakota, scheduled for December 8 to 9. See Chieply Decl., ¶ 17; see also id., Exh. 10. This invitation contained a link to the cultural surveys provided by Dakota Access. Id. Five tribes attended this meeting. Id., ¶ 18. Standing Rock did not. Id. At the meeting, the Corps made sure that the tribes had copies of the cultural surveys, and the group agreed to reconvene on January 25, 2016, to discuss any issues they found with those surveys. Id. Around the time of this meeting, the Corps also independently looked through these cultural surveys and other route maps to determine whether any additional DAPL crossings might have the potential to affect historic properties. See ECF No. 21-18, Exh. 16. The Corps concluded that only the James River crossing (PCN #4) raised any concerns; no others triggered the need for a PCN under General Condition 20. Id.

During this tribal gathering, Morgan sent a letter to the Corps, indicating that the Tribe was "still interested in formal consultation on the proposed" pipeline despite its decision not to attend. See ECF No. 6, Exh. 12 (Letter from Morgan to Chieply on Dec. 8, 2015) at 1. The Tribe yet again noted that it had not received a response from the Corps about the concerns it had raised in regard to the bore testing. Id. Morgan also protested that the testing should not proceed prior to mitigation efforts and indicated that the Tribe did not concur in the "no effects" determination for this work. Id. at 2. This, of course, makes little sense given that Young had already acknowledged in previous letters from the Tribe that they were aware the soil-bore testing had already taken place back in the spring. See, e.g., Letter from Young to Henderson on Sept. 28, 2015 (recognizing "soil bore testing has already occurred despite our initial correspondence"). In any event, Morgan further indicated that the Tribe looked forward to playing a primary role in any surveying or monitoring and explained that it would refuse to participate in tribal meetings until Colonel Henderson came to their reservation to meet with them first. Letter from Morgan to Chieply (Dec. 8, 2015) at 1. Finally, she informed the Corps that the Tribe thought the draft EA could not be issued prior to a full cultural-resources survey. Id. at 2.

Again, the Corps appears to have taken action in response to the Tribe's demands. Henderson ordered Omaha District Deputy Commander, Lieutenant Colonel Michael D. Sexton to attempt to schedule a meeting with Plaintiff for him. See Ames Decl., ¶ 17. He did so in response to the setbacks experienced by Ames in attempting to secure the same over the previous months. Id. The Tribe, however, never returned Sexton's calls about scheduling a meeting either, and Young subsequently left her position with the Standing Rock Sioux. Id.

On December 8, the Corps released a draft EA for the project, which contained a request for comment by January 8, 2016. See Shelman Decl., ¶ 8. In the portion of the EA describing the Section 106 process, the draft explained that consultations began in November 2014 for initial geotechnical explorations, which then closed in January 2015. See ECF No. 6, Exh. 13 (Draft EA, Nov. 2015) at 58. The draft next described the ongoing process, starting in July 2015, for consultation related to the actual pipeline construction. Id. In so doing, it acknowledged the Corps' failure to secure onsite visits or government-to-government meetings to date. Id. at 58-59. In the very next section, the EA indicated that Young had said in the October 2014 meeting with Dakota Access that the Lake Oahe HDD process "appeared to avoid impacts to known sites of tribal significance." Id. at 59.

7. *2016*

The Tribe provided timely and extensive comments to the draft EA in letters on January 8 and March 24, 2016. See ECF No. 6, Exh. 14 (Standing Rock Comments on Draft EA); id., Exh. 15 (Standing Rock Supplemental Comments). In these comments, Archambault asserted that the Corps had failed to consult on the identification of cultural sites important to the Tribe. See

Standing Rock Comments on Draft EA at 2-3; see also id. at 4 (asserting Corps violated its own policy to hold "an active and respectful dialogue. . . before decisions are made and actions are taken"); id. (claiming bore testing violated NHPA because Corps did not include Tribe in decisionmaking process); id. at 6 (noting Corps reliance on old surveys conducted before 1992 Amendments to NHPA). He explained the importance of such consultations by, in part, describing tribal "oral traditions and historical records" that recorded the presence of known sites and burials in the direct path of the pipeline. Id. (counting "at least 350 known sites within the project corridor in North Dakota alone"); see also id. at 4 (indicating that Draft EA misrepresented Tribe's position in October 2014 meeting thanks to false impression from Dakota Access). As a result, he concluded that those outside the Tribe could not properly identify these sites. Id. He additionally criticized the 400-foot corridor used for the Dakota Access surveys as too narrow and described the "no effects" determination by the Corps for sites within the corridor as lacking "scientific or engineering support." Id. at 7-8. Archambault, in his later supplemental comments, again stressed the importance of tribal participation in the identification of historic properties and, accordingly, decisions about potential alternative routes for the pipeline. See Standing Rock Supplemental Comments at 23-24. He also cited the Advisory Council's Section 106 regulations and case law to support his assertion that form letters and public meetings could not meet the Corps' obligations under the NHPA to consult with the tribes. Id. In conclusion, he implored the Corps to assure that full cultural surveys would be done, with tribal input, on the entire pipeline. Id. at 28-29. Two other tribes also indicated at this time that they thought they had not yet been fully consulted on the potential effects of the pipeline. See ECF No. 6, Exhs. 22-24.

The Section 106 process between the Corps and Tribe finally picked up steam in the spring of 2016. From January to May, there were no fewer than seven meetings between the two entities. On January 22, Corps Senior Archaeologist Harnois met at the reservation with Chairman Archambault; the Tribe's new THPO Ron His Horse is Thunder; Morgan; and the Tribe's Section 106 Coordinator, LaDonna Brave Bull Allard. See Harnois Decl., ¶ 27. Three days later, on January 25, the Tribe participated in the follow-on tribal meeting to discuss the Dakota Access cultural surveys. See Chieply Decl., ¶ 21. Next, on March 3, Corps staff held a meeting with the Tribe at Corps headquarters. See Ames Decl., ¶ 29. Perhaps most significantly, Morgan met with the Corps to express specific concerns about tribal burial sites at the James River crossing (PCN # 4). See Harnois Decl., ¶ 24. Based on the information she provided, the Corps verified the presence of cultural resources at the site and successfully instructed Dakota Access to move the pipeline alignment to avoid them. Id.

Colonel Henderson also attended several meetings with the Tribe. He first officiated at a third tribal summit on February 18-19, again with Standing Rock participation. See Chieply Decl., ¶ 22. Then, he attended meetings with Standing Rock on February 26, April 29, and May 14. See Ames Decl., ¶¶ 26, 33, 36. Through these conversations, Henderson committed the Corps to imposing several additional conditions on DAPL, such as double-walled piping, in response to tribal concerns about environmental safety. Id., ¶ 27. One of these summits also included an onsite visit to the Lake Oahe crossing. See Harnois Decl., ¶ 28; see also Archambault Decl., ¶ 19. During that visit, Chairman Archambault "pointed out areas of concern and explained the tribe's issues with the pipeline project." Harnois Decl., ¶ 28. Indeed, in March, Archambault acknowledged that the Corps had recently made strides toward righting the Section 106 ship and indicated he felt this particular onsite visit was productive at identifying new stones, graves, burial sites, and earthen lodges that needed to be considered by the Corps. See Supplemental Comments on Draft EA at 26-27. Henderson and Archambault exchanged letters about the project throughout the spring as well. Id., ¶ 30.

The improved relationship, however, had its limits. In the spring, the Corps worked with Dakota Access to offer consulting tribes an opportunity to conduct cultural surveys at PCN locations where the private landowner would permit them. See Chieply Decl., ¶ 28. This included 7 of the 11 sites in North and South Dakota. Id. Three tribes took the opportunity, and it paid off. See ECF No. 22, Exh. C (Declaration of Michelle Dippel) ¶ 28. The Upper Sioux Community identified areas of tribal concern at three PCN sites, and Dakota Access agreed to additional avoidance measures at all of them. Id. At one of these sites, the tribal surveyors and the Iowa SHPO declared a site eligible for listing on the National Registry that had not previously been identified on Dakota Access's surveys. See Eagle Decl., ¶¶ 32-36; see also Mentz Decl., ¶¶ 38-39 (describing his hiring to conduct surveys for the Upper Sioux). Dakota Access agreed in response to this discovery to bury the pipeline 111 feet below the site to avoid disturbing it. See Mot. Hearing Trans. at 36. Similarly, the Osage Tribe identified areas through their surveys that they wished to monitor during construction, and the company granted that request too. Id.

Standing Rock took a different tack. The Tribe declined to participate in the surveys because of their limited scope. See Chieply Decl., ¶ 29. Instead, it urged the Corps to redefine the area of potential effect to include the entire pipeline and asserted that it would send no experts to help identify cultural resources until this occurred. Id. In a responsive email, the Corps expressed its regret that the Tribe would not participate and welcomed any knowledge or information regarding historic properties that it was still willing to provide. Id. The Corps went on to explain that it did not "regulate or oversee the construction of pipelines, and [its] regulatory control is limited to only a small portion of the land and waterways that the pipeline traverses." Id., Exh. 14. While the Corps' regulations allowed it to consider uplands outside "waters of the United States," the email asserted that work in these areas had to be "directly associated [with], integrally related [to]," and caused by the "in-water authorized activity" before the Corps could claim authority over it. Id.

The Tribe did engage in two more visits to Lake Oahe with the Corps around this time. See Eagle Decl., ¶¶ 13-14; Harnois Decl., ¶ 29. First, on March 8, Morgan and the Tribe's latest THPO, Jon Eagle, identified areas of potential cultural significance to the Corps and described the area's sacred importance to the Standing Rock people. See Harnois Decl., ¶ 29. Several of the sites they identified were in areas that the Corps had determined were well outside the area of potential impact for the project, such as a cemetery approximately 1.2 miles from the nearest bore pit and .6 miles from the HDD preparation and construction area. Id. The group also toured the Cannonball Village site. Id. At this site, Morgan and Eagle pointed out places in the mole dirt where "pottery shards, pieces of bone, flint and tools used for scraping hides and cutting" were visible. See Eagle Decl., ¶ 14. Eagle, in addition, pointed out a sacred stone in the area that is still used for prayer. Id., ¶ 15. During the visit, Corps staff acknowledged that they had been previously unaware of some of these cultural resources and committed to further study of them. Id., ¶ 14. Morgan and Harnois thereafter exchanged several follow-up emails to discuss the Tribe's "concerns and questions" generated by the onsite visit. See Harnois Decl., ¶¶ 30-31. The Corps nevertheless ultimately determined that the Cannonball Village site was not in the area that would be affected by DAPL-related construction work. Id., ¶ 29.

The second onsite visit occurred on March 22 and went much the same as the first. Id., ¶ 32. This time, however, Morgan asked questions about the surveying that had been done on the area as part of the Northern Borderline Pipeline project – a pre-existing natural-gas pipeline installed under Lake Oahe that runs parallel to DAPL's proposed course. Id. Harnois continued discussions with her about the adequacy of the mapping and considered requiring additional testing on the site. Id. Ultimately, however, Harnois determined that additional testing would not be necessary based on his later review of the site documentation and research. Id.

The Corps then sought to end the Section 106 process for the Lake Oahe crossing. On April 22, Harnois made a Determination of Effect for the site and emailed it to the consulting parties. Id., ¶ 33; see also ECF No. 6, Exh. 43. In it, Harnois described the project, explained the location, and discussed data on 41 potential historic sites in detail. Id. He concluded that one of the sites identified, 32MOx0570, was "not eligible" for listing and that the project overall had "no historic properties subject to effect." Id. Four days later, the North Dakota SHPO concurred with his determination via email. See Harnois Decl., ¶ 34. Harnois then notified the Tribe of this concurrence. Id., ¶ 35. Both Chairman Archambault and Eagle formally objected to the determination. See ECF No. 6, Exh. 30 at 2 ("To date, none of our request for consultation or Class III Cultural Surveys has been honored."); id., Exh. 31. As a result, the Tribe and Corps continued their dialogue on these issues. See Ames Decl., ¶ 36; Chieply Decl., ¶¶ 32, 35 (describing Corps response to these objections).

The Advisory Council – the agency responsible for commenting on NHPA compliance for federal undertakings – also sent the Corps a series of letters about the adequacy of the Section 106 process around this time. After the Corps published the draft EA, the Advisory Council requested verification from the Corps of its consultation efforts and relayed concerns expressed to them by Archambault about the consultations (or lack thereof) that had occurred to date with Standing Rock. See ECF No. 6, Exh. 20 (Advisory Council Comment on Draft EA) at 2. The Advisory Council formally entered the Section 106 consultation process for DAPL soon thereafter. See Chieply Decl., ¶ 27. Then, in March, the Advisory Council wrote to express its skepticism about the Corps' determination that the entire pipeline was not subject to its jurisdiction. See ECF No. 6, Exh. 25 (Letter from Advisory Council to Henderson on Mar. 15, 2016). In particular, the Advisory Council felt that the PCNs required for various portions of the pipeline transformed the entire pipeline into an undertaking. Id. In addition, the Advisory Council described itself as "perplexed by the Corps' apparent difficulties in consulting" with Standing Rock. Id. Again, on May 6, the Advisory Council wrote with additional questions relating to the DAPL permit area, tribal consultations, and federal-agency coordination. See ECF No. 6, Exh. 26. The Advisory Council also formally objected to the Corps determination of "no effects," citing numerous deficiencies in the Section 106 process, including the failure of the Corps to properly define the scope of its responsibilities. See ECF No. 6, Exh. 32. Finally, on June 2, the Advisory Council requested that the Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy, review that "no effects" determination. See Chieply Decl., ¶ 32.

The Corps responded to these letters with several of its own. On May 13, Henderson wrote to reiterate that the Corps could not exercise control over portions of the project not subject to its jurisdiction. See id.; see also id., Exh. 15. In his letter, Henderson contested the Advisory Council's conclusion that the permitted activity determined the entire right-of-way for the pipeline, instead contending that the crossing of jurisdictional waters did not ultimately control project alignment elsewhere. Id. He further explained that the use of HDD in many places would avoid Corps jurisdiction altogether by eliminating any discharge of dredge or fill materials into regulated waters. Id. On June 30, the Assistant Secretary of the Army also replied. See Chieply Decl, ¶ 38; see also ECF No. 6, Exh. 39. In her letter, she reiterated the Corps' position on its own jurisdiction, asserted tribes were notified and invited to participate and provide information, and contested the Advisory Council's claim that field visits had identified the presence of new areas within the APE for the project. Id.

The Corps then moved to close the book on the matter. On July 25, 2016, it issued an EA finding of "no significant impact" and verified all 204 PCN locations under NWP 12. See ECF No. 6, Exhs. 33-36; Ames Decl., ¶ 36. The PCNs, however, contained additional restrictions. See ECF No. 6, Exhs. 33-36. Most importantly, they instituted a "Tribal Monitoring Plan" that requires Dakota Access to allow tribal monitors at all PCN sites when construction is occurring. Id. Dakota Access immediately notified the tribes of its intent to begin construction at the PCN sites within five to seven days. See ECF No. 6, Exh. 49 (Letter from Dippel to Upper Sioux).

* * *

In summary, the Corps has documented dozens of attempts it made to consult with the Standing Rock Sioux from the fall of 2014 through the spring of 2016 on the permitted DAPL activities. These included at least three site visits to the Lake Oahe crossing to assess any potential effects on historic properties and four meetings with Colonel Henderson.

E. Procedural History and Recent Activities

Two days after the Corps issued the PCN authorizations, Standing Rock filed this suit against it under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, asserting in part that the Corps had violated its obligation under the NHPA prior to issuing the permitting for DAPL-related construction along the entire pipeline route. The Tribe then filed, on August 4, 2016, this Motion for Preliminary Injunction to mandate a withdrawal of this permitting. The next day, Dakota Access intervened in the action in support of the Corps. See ECF No. 7 (Dakota Access Motion to Intervene). The Court subsequently permitted intervention by the Cheyenne River Sioux Tribe on Plaintiff's side, though it did not participate in this Motion. After a scheduling conference on August 8, the Court ordered an expedited briefing schedule and set a hearing on the Motion for August 24.

At the Motion hearing, Dakota Access revealed that most of the construction associated with DAPL is, in fact, already complete. Because only 3% of the pipeline is subject to federal permitting, Dakota Access has always been free to proceed with the vast majority of the construction, which will occur on private land. In fact, 48% of the pipeline had already been cleared, graded, trenched, piped, backfilled, and reclaimed. See Mot. Hearing Trans. at 24. The company also moved fast elsewhere; this figure included all but 11 of the 204 sites that the Corps had subjected to PCN authorization. Id. at 25. All of the necessary clearing and grading has also been done in South Dakota, and 90% of it is complete in North Dakota. Id. at 24. One of the few exceptions is the crossing leading up to the west side of Lake Oahe, which has not yet been cleared or graded.

The tribal monitoring and GC 21 unexpected-discovery protocols also appeared to be in place for the activity that was permitted by the Corps. Id. at 37-39. When construction is ongoing for such activities, Dakota Access allows archaeological and tribal monitors onsite to look for evidence of cultural or historic resources. Id. As of the hearing, construction had triggered the unexpected-discovery protocol six times. Id. at 39. In each case, construction stopped until the state, federal, and tribal representatives confirmed that the resources were not being damaged. Id. Each one turned out to be a false alarm. Id. At the conclusion of the hearing, the Court informed the parties that it would issue its decision on September 9, two weeks being necessary to adequately review the voluminous record and draft this lengthy Opinion.

Nine days after the hearing, on Friday, September 2, the Tribe filed a supplemental declaration by Tim Mentz, the Tribe's former Tribal Historic Preservation Officer and a member of the Standing Rock Sioux Tribe. See ECF No. 29-1 (Supplemental Declaration of Tim Mentz, Sr.). In the declaration, Mentz explained that he had been invited by a landowner to conduct cultural surveys on private land along the DAPL route that had already been cleared for pipeline construction. See id., ¶¶ 2-3; see also id., Exh. 1. This land was about 1.75 miles from the construction activity that the Corps has actually permitted at Lake Oahe. Id., ¶ 3. In other words, the area in question was entirely outside the Corps' jurisdiction. The construction activity on it, as a result, never required a federal permit, and neither the Corps nor any other federal agency had any control over it. Because these activities do not require a federal permit, they are also not necessarily subject to the attendant restrictions to protect historic properties – *i.e.*, GC 21 and tribal monitoring – placed by the Corps on the activities that it did permit.

Mentz, over the course of several days beginning on August 30, avers that he surveyed this private land around the pipeline right-of-way. Id., ¶ 6. During these surveys, he observed several rock cairns and other sites of cultural significance inside the 150-foot corridor staked for DAPL construction. Id., ¶¶ 7-11. He was, however, confined in his actual surveying to those areas immediately adjacent to the pipeline right-of-way and did not enter the corridor itself. Id. Mentz documented the presence of several sites that he believed to be of great cultural note nearby, including a stone constellation used to mark the burial site of a very important tribal leader about 75 feet from the pipeline corridor. Id., ¶ 10. Mentz did not observe any fencing or other protective measures around these sites. Id., ¶ 9. He also observed what he believed to be important stone features within the pipeline corridor. Id., ¶ 11. According to Mentz, none of these sites was documented on the earlier cultural surveys of the area commissioned by Dakota Access. Id., ¶ 17.

The next day, on Saturday, September 3, Dakota Access graded this area. See ECF No. 30 (Emergency Motion for Temporary Restraining Order). On September 4, both the Tribe and the Cheyenne River Sioux Tribe filed for a Temporary Restraining Order on any additional construction work at the site described by Mentz – *i.e.*, the length of the pipeline route for approximately two miles west of Highway 1806 in North Dakota – and for any additional construction work on the pipeline within 20 miles on either side of Lake Oahe, until the Court ruled on this Motion for Preliminary Injunction. Id. The Corps responded that it would not oppose the restraining order while awaiting this decision.

Dakota Access, not surprisingly, hotly contested Mentz's version of events in its opposition to the TRO motion. In a map of the area, the company sought to demonstrate that many of the sites documented by Mentz were in fact well outside the pipeline route. See ECF No. 34 (Response to TRO) at 6-8. The rest, according to Dakota Access, were directly over the existing Northern Border Natural Gas Pipeline that runs through the area and thus could not have been historic artifacts. Id. at 6. The company instead alleges that the route of the pipeline in this area proves its point: it twists and turns to avoid the finds that Mentz documented adjacent to the pipeline and thus demonstrates that Dakota Access did purposefully shift the route to avoid any sites of cultural significance in its planning phase. Id. The Court acknowledges that the map provided by the company does seem to indicate that the pipeline curves to accommodate the cultural sites. Id. at 7.

This Court held a TRO hearing on September 6, the first business day after that motion was filed. Without making factual determinations about the truth of Mentz's observations, the Court was able to obtain Dakota Access's agreement not to perform any construction activities within 20 miles east of Lake Oahe and within about two miles west of the Lake, as it had already ceased such operations while awaiting the Court's preliminary-injunction ruling. The Court otherwise denied the TRO. This current Opinion now issues on a highly expedited basis.

II. Legal Standard

"[I]njunctive relief" is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Def. Advisory Council, Inc., 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Id. at 20. Before the Supreme Court's decision in Winter, courts weighed the preliminary-injunction factors on a sliding scale, allowing a weak showing on one factor to be overcome by a strong showing on another factor. See, e.g., Davenport v. Int'l Bhd. of Teamsters, 166 F.3d 356, 360-61 (D.C. Cir. 1999). This Circuit, however, has suggested, without deciding, that Winter should be read to abandon the sliding-scale analysis in favor of a "more demanding burden" requiring plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm. See Sherley v. Sebelius, 644 F.3d 388, 392-93 (D.C. Cir. 2011); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009).

Whether a sliding-scale analysis still exists or not, courts in our Circuit have held that "if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors." Dodd v. Fleming, 223 F. Supp. 2d 15, 20 (D.D.C.

2002) (citing CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995)). Likewise, a failure to show a likelihood of success on the merits alone is sufficient to defeat a preliminary-injunction motion. Ark. Dairy Co-op Ass'n, Inc. v. USDA, 573 F.3d 815, 832 (D.C. Cir. 2009) (citing Apotex, Inc. v. FDA, 449 F.3d 1249, 1253 (D.C. Cir. 2006)). It follows, then, that the Court may deny a motion for preliminary injunction, without further inquiry, upon finding that a plaintiff is unable to show either irreparable injury or a likelihood of success on the merits. Here, Standing Rock fails on both grounds.

III. Analysis

The Corps gave the go-ahead, under NWP 12, for DAPL's construction activities in federally regulated waters at hundreds of discrete places along its nearly 1,200-mile route. In seeking a preliminary injunction, the Tribe contends that the Corps, in doing so, shirked its responsibility to first engage in the tribal consultations required by the NHPA. Because DAPL construction is ongoing, the Tribe further asserts that sites of great significance will likely be damaged or destroyed unless this Court pumps the brakes now. It also contends that the balance of harms and the public interest favor its position.

Defendants rejoin that preliminary-injunctive relief is inappropriate both because the Corps has satisfied its obligations under the NHPA – in other words, the Tribe is unlikely to succeed on the merits of its NHPA claim – and because the Tribe has failed to show that any harm will befall it in the absence of an injunction. As the Court agrees on both points, it need not consider the final two factors – balance of harms and the public interest – to deny the Motion. It now discusses the merits and the harm separately.

A. Likelihood of Success on the Merits

Although the Tribe's legal theory is not entirely clear, the Court believes it can infer four separate arguments that the Corps' permitting of DAPL was unlawful. First, the Standing Rock Sioux assert that the Corps violated the NHPA when it promulgated NWP 12 without a Section 106 process. Next, they contend that, even if the Corps could defer site-specific Section 106 consultations when promulgating NWP 12, it violated the NHPA by permitting DAPL-related activities at some federally regulated waters without a Section 106 determination. Third, the Tribe maintains that, even where the Corps did conduct a Section 106 process, it unlawfully narrowed the scope of its review to only those areas around the permitted activity, as opposed to the entire pipeline. Finally, the Tribe urges that the Section 106 process at the PCN sites was inadequate because the quality of the consultations was deficient. None of these claims appears likely to succeed on the merits at this stage.

1. *NWP 12*

Although many DAPL-related construction activities in federally regulated waters occurred or will occur at places where the Corps did not require a PCN verification, such activities nevertheless required approval from the Corps under the CWA or RHA. That approval was provided on a general level when the Corps re-promulgated NWP 12 in 2012. Because these activities thus were "permitted" by a federal agency, they fall within the NHPA's definition of a federal "undertaking." See 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). As federal undertakings, they triggered the Corps' NHPA duty to consider, prior to the issuance of the permit, their effects on properties of cultural or historic significance. See 54 U.S.C. § 306108 ("[P]rior to the issuance of any license, [the federal agency] shall take into account the effect of the undertaking on any historic property.”). According to the Tribe, the Corps did not fulfill this obligation because NWP 12 was issued without any tribal consultations.

As an initial matter, the Tribe’s assertion that the Corps did not engage in any NHPA consultations prior to promulgating NWP 12 is false. Before issuing NWP 12, the Corps, in November 2009, sent an early notification to tribes, including Standing Rock, containing information pertaining to its proposed NWPs. See ECF No. 21, Exh. 14 (Letter from Ruchs to Brings Plenty on Nov. 9, 2009). The letter contained a graphic depiction of the types of activities that were most often authorized by nationwide permits in the Omaha District. Id. In addition, in 2010, the Corps proceeded to hold “listening sessions and workshops” with tribes to discuss their concerns related to the proposed nationwide permits. See ECF No. 21, Exh. 13 (Tribal Information Fact Sheet). In March 2010, the Corps contacted Standing Rock personally to discuss the permits and any additional regional conditions that the Tribe thought might need to be included to protect their cultural resources. See Chieply Decl., ¶ 5.

Then, on February 10, 2011, the Corps sent a letter to the Standing Rock Sioux Tribal Chairman and THPO Young, notifying them of its plan to publish a proposal in the Federal Register to reissue NWP 12. See ECF No. 21, Exh. 13 (Letter from Ruchs to Murphy on Feb. 10, 2011). Attached to the letter, the Corps provided a description of the proposed NWP 12, as well as a draft of the current Omaha District regional conditions that would apply to the permit. Id. The Corps requested that the Tribe “consider this letter our invitation to begin consultation on the proposal to reissue the NWPs.” Id. It went on to say that the Corps “look[s] forward to consulting with you on a government-to-government basis on this issue” and requested that the Tribe notify the Corps if it was “interested in consulting.” Id. The Corps further committed to provide a “Corps representative at consultation and fact-finding meetings” and to “fully consider any information you wish to provide." Id. In an email on March 9, 2011, the Corps followed up on the offer. See Chieply Decl., ¶ 7. The Corps also seems to have conducted district-level tribal listening sessions and workshops. See Tribal Information Fact Sheet at 1. There is no indication in the record that the Tribe responded to the Corps' invitation to consult, but was ignored. The Tribe, in fact, concedes that it did not participate in the notice-and-comment for NWP 12 at all. See Reply at 2. When it actually promulgated NWP 12, moreover, the Corps included a section on its compliance with the NHPA, noting that GC 20 "requires consultation for activities that have the potential to cause effects to historic properties" prior to those activities' proceeding under the general permit. See ECF No 6, Exh. 1 (Nationwide Permit 12 Decision Document) at 10 (emphasis added).

To the extent that the Tribe now seeks in this Motion to launch a belated facial attack against NWP 12, then, it is unlikely to succeed. The Corps made a reasonable effort to discharge its duties under the NHPA prior to promulgating NWP 12, given the nature of the general permit. Cf. Sierra Club v. Bostick, 787 F.3d 1043, 1047, 1057 (10th Cir. 2015) (holding Corps permissibly interpreted CWA "to allow partial deferral of minimal-impacts analysis" because of "the difficulty of predicting the impact of activities allowed under nationwide permits"). Without definite knowledge of the specific locations that would require permitting in the future, it is hard to ascertain what else the Corps might have done, before issuing a general permit, to discharge its NHPA duties. In other words, the Corps, when it promulgated NWP 12, had no knowledge of DAPL or its proposed route. The CWA and RHA plainly allow the Corps to do just what it did here: preauthorize a group of similar activities that, alone and combined, have minimal impact on navigable waterways. This Court cannot conclude that the Corps does not have the ability to promulgate these general permits at all. As a result, the Corps' effort to speak with those it thought might be concerned was sufficient to discharge its NHPA obligations.

This conclusion is reinforced by the limited scale and scope of the federally sanctioned activities at issue. The Advisory Council's regulations provide that the "agency official should plan consultations appropriate to the scale of the undertaking and the scope of the Federal involvement." 36 C.F.R. § 800.4(a). Here, the scope of the Corps' involvement was limited. It never had the ability, after all, to regulate the entire construction of a pipeline. Congress has decided that no general federal regulation applies to domestic oil pipelines. In addition, the scale of the federally permitted undertaking here is narrow. The CWA and RHA regulate, as relevant here, only certain limited construction activities in waterways. The CWA, moreover, restricts the use of general permits to an even narrower subset of these already limited activities in waterways. The Corps can only authorize discharges that have a minimal impact on the jurisdictional waterway through a general permit. See 33 U.S.C. § 1344(e). In other words, NWP 12, by definition, can authorize only that regulated conduct that will have little effect on the regulated waterway in the first place. Given these restrictions, the Corps' decision to promulgate NWP 12 after the effort to consult that it made here was reasonable.

The Tribe responds that the Corps was instead required to work out a "programmatic agreement" with any tribe that might one day be affected by the activities permitted under NWP 12. See Mot. at 22-23. A programmatic agreement is an "agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings" that is negotiated by the Advisory Council and the permitting agency. See 36 C.F.R. § 800.14(b). On this score, Standing Rock is certainly right that the Corps could have pursued a programmatic agreement to fulfill its NHPA duties, as it did in 2004 with several tribes in regard to the Missouri Basin. See ECF No. 6, Exh. 4 (Programmatic Agreement). But the Advisory Council does not make the pursuit of a programmatic agreement mandatory. See 36 C.F.R. § 800.14(b) ("The Advisory Council and the agency official may negotiate a programmatic agreement.") (emphasis added). The Court thus cannot conclude that a PA was the only avenue available to the Corps to fulfill its duties under the NHPA. There is, indeed, no indication that such a requirement would even be feasible for a nationwide permitting scheme given the sheer number of possible consulting parties. Nor could the Corps have complied with the full Advisory Council process, which is clearly designed for project-specific determinations. As a result, it was reasonable for the Corps to engage in a general process at the time it promulgated NWP 12 and to defer site-specific NHPA determinations to a later time.

2. *NWP 12 Applied at Non-PCN Sites*

The Tribe next argues that NWP 12's operation is unlawful because the Corps makes no site-specific Section 106 determination for numerous generally permitted activities – *i.e.*, non-PCN sites. In particular, it claims that GC 20 improperly delegates authority to the permittee to assess whether its activities will have a potential effect on historic properties. To refresh the reader, GC 20 requires that "[i]n cases where the district engineer determines that the activity may affect [NHPA] properties . . . , the activity is not authorized, until the requirements of Section 106 of the [NHPA] have been satisfied." 77 Fed. Reg at 10,284. The Advisory Council, too, seems to concur that, in individual cases of permitting under NWP 12, Section 106 is not satisfied where the Corps itself does not make a site-specific determination about whether a permitted activity has the potential to affect historic properties. See ECF No. 6, Exh. 50 at 1-2. As the Tribe and the Advisory Council read GC 20, the Corps never considers whether an individual activity will have the potential to affect historic sites unless the permittee decides that it might and, accordingly, seeks a PCN. The Corps, in turn, responds that it does consider itself to retain the authority and responsibility under GC 20 to determine whether permitted activity has the potential to damage historic properties. See Corps Opp. at 13-14.

Standing Rock and the Advisory Council make a good argument. It is possible that the Corps' permitting under NWP 12 would be arbitrary and capricious where it relies completely on the unilateral determination of a permittee that there is no potential cultural resource that will be injured by its permitted activity. Fortunately, this Court need not decide that issue because that is not how the Corps interpreted and applied GC 20 to DAPL. In this case, the Corps looked at reports and maps of the pipeline to determine which jurisdictional crossings had the potential to affect historic properties. See Chieply Decl., Exh. 16 at 1; see also id., Exh. 15 at 1. These extensive maps reflected cultural surveys conducted by licensed archaeologists (sometimes with SHPO participation). See Howard Decl., ¶¶ 4-10; see, e.g., ECF No. 6, Exh. 44. The Corps ultimately concluded that only 204 of the jurisdictional crossings triggered either GC 20 or some other concern that would require a PCN verification. See Chieply Decl., Exh. 16 at 1.

The Court must review that determination under the Administrative Procedure Act's deferential standard. See 5 U.S.C. § 706(2)(a). Under this standard, the Tribe bears the burden to demonstrate that the agency action was unlawful, arbitrary or capricious, or not in accordance with the law. See Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976). Plaintiff has not done so here. At no point has the Tribe clearly pointed this Court to a specific non-PCN activity – *i.e.*, crossings the Corps permitted – where there is evidence that might indicate that cultural resources would be damaged. The Tribe instead focuses on the potential impact to cultural resources elsewhere along the pipeline. But to show the Corps' determination was unreasonable, Standing Rock needs to offer more than vague assertions that some places in the Midwest around some bodies of water may contain some sacred sites that could be affected. For example, if the Corps had not required a PCN verification for a site like Lake Oahe (assuming it was not subject to the RHA), to which the Tribe has shown it has important historic and cultural connections, this Court might well find unreasonable the Corps' determination that construction at the site would have no potential to cause negative effects to these resources. Without such a specific showing involving a site within the Corps' jurisdiction, however, the Court can find no ground at this juncture to hold that the Corps' considered judgment – based as it was on its expertise, the activity involved, extensive cultural surveys, and additional research – was unreasonable. The Tribe has had more than a year to come up with evidence that the Corps acted unreasonably in permitting even a single jurisdictional activity without a PCN, and it has not done so. As a result, it has not met its burden here.

3. *Scope of Section 106 Process at PCN Sites*

The Tribe next asserts that the Corps' Section 106 process was deficient even at those places where it did in fact require a PCN notification. Here, again, Standing Rock largely focuses its efforts on a sweeping claim that the Corps was obligated in permitting this narrow activity – *i.e.*, certain construction activities in U.S. waterways – to consider the impact on potential cultural resources from the construction of the entire pipeline. In particular, the Tribe contends that the NHPA requires such an analysis because the statute defines the potential effect of an undertaking to include the indirect effects of the permitted activity on historic properties.

This argument, however, misses the mark. In its regulations concerning compliance with the adverse-effects analysis required by the NHPA, the Corps determined that entire pipelines need not be considered part of the analyzed areas. Rather, only construction activity in the federally regulated waterways – the direct effect of the undertaking – and in uplands around the federally regulated waterways – the indirect effect of the undertaking – requires analysis. See 33 C.F.R. pt. 325, app. C, § 1(g)(i). This Circuit has held just such an approach to be reasonable in the context of a challenge brought under a similar "stop, look, and listen" provision in NEPA, and these two statutes are often treated similarly. See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1294-95 (D.C. Cir. 2007) ("Because of the 'operational similarity' between NEPA and NHPA, both of which impose procedural obligations on federal agencies after a certain threshold of federal involvement, courts treat 'major federal actions' under NEPA similarly to 'federal undertakings' under NHPA."). Specifically, this Circuit held that where a federal easement and CWA permitting encompassed only five percent of the length of a pipeline, "the federal government was not required to conduct NEPA analysis of the entirety of the . . . pipeline, including portions not subject to federal control or permitting." Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 34-35 (D.C. Cir. 2015). Other Circuits have held the same. See Bostick, 787 F.3d at 1051-54 (holding Corps was not required to prepare NEPA analysis of entire pipeline when verifying NWPs for 485-mile oil pipeline crossing over 2,000 waterways); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 272-73 (8th Cir. 1980) (concluding same for electric utility line). The Tribe offers no persuasive argument as to why the facts here demand a different conclusion. As a result, this Court cannot conclude here that a federal agency with limited jurisdiction over specific activities related to a pipeline is required to consider all the effects of the entire pipeline to be the indirectly or directly foreseeable effects of the narrower permitted activity.

The Corps' decision in this regard is also entitled to deference under the APA as it falls squarely within the expertise of the Corps, not the Advisory Council, to determine the scope of the effects of construction activities at U.S. waterways. See Bldg. & Constr. Trades Dep't v. Brock, 838 F.2d 1258, 1266 (D.C. Cir. 1988) (holding courts must be especially deferential to an agency's determination within an area in which it has "special expertise"). The Tribe, moreover, fails to provide any evidence that would call the Corps' technical judgment in this regard into question. See 33 C.F.R. pt. 325, app. C, § 1(g)(i) (explaining that for linear crossings, the "permit area shall extend in either direction from the crossing to that point at which alternative alignments leading to a reasonable alternative locations for the crossing can be considered and evaluated"). The Tribe contends instead, without evidence, that the entire pipeline must be the indirect effect of the permitted activity because the pipeline cannot feasibly avoid all federally regulated water crossings. In other words, no permitting means no pipeline. The Court cannot say on this record, however, that the Tribe is right. In fact, as DAPL's own construction demonstrates, the use of technology such as HDD can at least sometimes avoid the Corps' jurisdiction at federally regulated waters by eliminating the need for the discharge of dredge or fill material.

The limited nature of the Corps' jurisdiction, in fact, reinforces the reasonableness of the its decision not to consider the effects of the entire pipeline on historic properties before issuing the DAPL permitting. "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency['s action] cannot be considered a legally relevant 'cause' of the effect." Dep't of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004). Section 106 analysis is designed only to "discourage[e] federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control." Lee v. Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1989). That section does not require that the Corps consider the effects of actions over which it has no control and which are far removed from its permitting activity. The Corps here ultimately determined that the route taken by the pipeline through private lands, up to a certain point approaching a federally regulated waterway, is driven by factors that have little to do with the discrete activities that the Corps needs to permit. The Court cannot conclude otherwise on this record. As such, it cannot hold the Corps' decision arbitrary, capricious, or otherwise unlawful.

4. Sufficiency of Consultations

Plaintiff's last point on the merits is that the Corps failed to offer it a reasonable opportunity to participate in the Section 106 process as to the narrow scope of the construction activity that the Corps did consider to be an effect of the permitted waterway activities. The factual proceedings recited in exhaustive detail in Section I.D., *supra*, tell a different story. The Corps has documented dozens of attempts to engage Standing Rock in consultations to identify historical resources at Lake Oahe and other PCN crossings. To the reader's relief, the Court need not repeat them here. Suffice it to say that the Tribe largely refused to engage in consultations. It chose instead to hold out for more – namely, the chance to conduct its own cultural surveys over the entire length of the pipeline.

In fact, on this record, it appears that the Corps exceeded its NHPA obligations at many of the PCN sites. For example, in response to the Tribe's concerns about burial sites at the James River crossing, the Corps verified that cultural resources indeed were present and instructed Dakota Access to move the pipeline to avoid them. Dakota Access did so. See Ames Decl., ¶ 24. Furthermore, the Corps took numerous trips to Lake Oahe with members of the Tribe to identify sites of cultural significance. See Summit Lake Paiute Tribe of Nevada v. U.S. Bureau of Land Mgmt., 496 F. App'x 712, 715 (9th Cir. 2012) (not reported) (holding four visits with a tribe to site constituted sufficient consultation for resolution of adverse effects). Colonel

Henderson also met with the Tribe no fewer than four times in the spring of 2016 to discuss their concerns with the pipeline. Ultimately, the Corps concluded that no sites would be affected by the DAPL construction at Lake Oahe, and the State Historic Preservation Officer who had visited that site concurred. The Corps' effort to consult the Tribe on this site – the place that most clearly implicated the Standing Rock Sioux's cultural interests – sufficed under the NHPA.

Contact, of course, is not consultation, and "consultation with one tribe doesn't relieve the [agency] of its obligation to consult with any other tribe." Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104, 1112, 1118 (S.D. Cal. 2010). But this is not a case about empty gestures. As noted in Section I.D., *supra*, and the examples just above, the Corps and the Tribe engaged in meaningful exchanges that in some cases resulted in concrete changes to the pipeline's route. "This is not a case like Quechan Tribe, where a tribe entitled to consultation actively sought to consult with an agency and was not afforded the opportunity." Wilderness Soc'y. v. Bureau of Land Mgmt., 526 F. App'x 790, 793 (9th Cir. May 28, 2013) (not reported).

The Tribe nevertheless asserts that the Corps' failure to include it in the early cultural surveys rendered the permitting unlawful for at least some of the PCN sites. These surveys, however, were not conducted by the Corps or under its direction. Even setting this fact aside, neither the NHPA nor the Advisory Council regulations require that any cultural surveys be conducted for a federal undertaking. The regulations instead demand only that the Corps make a "reasonable and good faith effort" to consult on identifying cultural properties, which "may include background research, consultation, oral history interviews, sample field investigations, and field survey." 36 C.F.R. § 800.4(b)(1). It goes without saying that "'may' means may." McCreary v. Offner, 172 F.3d 76, 83 (D.C. Cir. 1999). These regulations contain "no requirement that a good faith effort include all of these things." Summit Lake Paiute, 496 F. App'x at 715. The Tribe, then, did not have an absolute right to participate in cultural surveying at every permitted undertaking, as it seems to argue. The Advisory Council regulations direct the agency to "take into account past planning, research, and studies" in making these types of determinations, see 36 C.F.R. § 800.4(b)(1), and that is just what the Corps did here. It gave the Tribe a reasonable and good-faith opportunity to identify sites of importance to it. As a result, the Court must conclude that the Tribe has not shown that it is likely to succeed on the merits of its NHPA claim at this stage.

B. Irreparable Injury

In seeking preliminary-injunctive relief here, the Standing Rock Sioux do not claim that a potential future rupture in the pipeline could damage their reserved land or water. Instead, they point to an entirely separate injury: the likelihood that DAPL's ongoing construction activities – specifically, grading and clearing of land – might damage or destroy sites of great cultural or historical significance to the Tribe. The risk that harm might befall such sites is a matter of unquestionable importance to the Standing Rock people. In the eloquent words of their Tribal Chairman:

> History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites. . . . Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost.

Archambault Decl., ¶¶ 6, 15. The tragic history of the Great Sioux Nation's repeated dispossessions at the hands of a hungry and expanding early America is well known. See, e.g., Dee Brown, Bury My Heart at Wounded Knee (1970); United States v. Sioux Nation, 448 U.S.

371 (1980). The threat that new injury will compound old necessarily compels great caution and respect from this Court in considering the Tribe's plea for intervention.

Although the potential injury may be significant, the Tribe must show that it is probable to occur in the absence of the preliminary injunction it now seeks. See Winter, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.") (emphasis added). This is the burden the law imposes for this form of relief. The Court must faithfully and fairly apply that standard in all cases, regardless of how high the stakes or how worthy the cause. After a careful review of the current record, the Court cannot conclude that the Tribe has met it.

To understand Standing Rock's deficit in this regard, it is necessary to first consider the nature of the relief it seeks. The Tribe has not sued Dakota Access here for any transgressions; instead, this Motion seeks to enjoin Corps permitting of construction activities in discrete U.S. waterways along the pipeline route. Such relief sought cannot stop the construction of DAPL on private lands, which are not subject to any federal law. Indeed, Standing Rock does not point the Court to any law violated by the private contracts that allow for this construction or any federal regulation or oversight of these activities. From the outset, consequently, no federal agency had the ability to prevent DAPL's construction from proceeding on these private lands. At most, the Corps could only have stopped these activities at the banks of a navigable U.S. waterway. An injunction of any unlawful permitting now can, at most, do the same.

The facts previously recited bear this simple conclusion out. Dakota Access, as has been explained, began its construction work on private lands long before it had even secured the Corps permitting that the Tribe now seeks to enjoin. See Mahmoud Decl., ¶ 47. Standing Rock concedes as much. See Mot. at 35; see also Mot. Hearing Tran. at 46 ("They started construction months ago, months before the permits were issued."). In many places, this work is already complete. See Mot. Hearing Trans. at 24. There is, moreover, no sign that Dakota Access will pull back from this construction on private land if this Court enjoins the NWP 12 permitting necessary for the 3% of DAPL's route subject to federal jurisdiction. Quite the contrary; the company has indicated that it has little choice but to push ahead in the hopes of meeting contract obligations to deliver oil by January 2017. See, e.g., id. at 40-41; see also Mahmoud Decl., ¶ 51.

The Tribe thus cannot demonstrate that the temporary relief it seeks here – *i.e.*, a preliminary injunction to withdraw permitting by the Corps for dredge or fill activities in federally regulated waters along the DAPL route – can prevent the harm to cultural sites that might occur from this construction on private lands. In other words, Standing Rock cannot show that any harm taking place on private lands removed from the Corps' permitting jurisdiction "will directly result from the action which [it now] seeks to enjoin." Hunter v. FERC, 527 F. Supp. 2d 9, 14-15 (D.D.C. 2007) (explaining that to obtain preliminary relief, "the movant must . . . show that 'the alleged harm will directly result from the action which the movant seeks to enjoin'") (quoting Wisc. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added)); see also Buckingham Corp. v. Karp, 762 F.2d 257, 261 (2d Cir. 1985) ("The purpose of a preliminary injunction is to protect the moving party from irreparable injury during the pendency of the action."). Powerless to prevent these harms given the current posture of the case, the Court cannot consider them likely to occur in the absence of the relief sought here. Put simply, any such harms are destined to ensue whether or not the Court grants the injunction the Tribe desires. As Standing Rock acknowledges, Dakota Access has demonstrated that it is determined to build its pipeline right up to the water's edge regardless of whether it has secured a permit to then build across. See Mot. Hearing Trans. at 46. Like the Corps, this Court is unable to stop it from doing so.

There is a second related problem with the Tribe's claim to irreparable injury, both on the private land and elsewhere along the pipeline. The risk that construction may damage or destroy cultural resources is now moot for the 48% of the pipeline that has already been completed. Id. at 24. As the clearing and grading are the "clearest and most obvious" cause of the harm to cultural sites from pipeline construction, id. at 18-19, 47 (recognizing that injunction is necessary anywhere not yet cleared "to prevent additional harm or construction until [cultural] surveys can take place"), moreover, the damage has already occurred for the vast majority of the pipeline, with the notable exception of 10% of the route in North Dakota, including at Lake Oahe. Here again, then, the Tribe has not shown for this substantial segment of the pipeline that any additional harm is likely to occur to cultural sites absent the preliminary injunction that it now seeks.

Yet a third problem bedevils the Tribe's efforts to enjoin permitting along the entire pipeline route. Plaintiff never defined the boundaries of its ancestral lands *vis-à-vis* DAPL. Instead, Standing Rock asserts that these lands extend "wherever the buffalo roamed." Even accepting this is true, to find that there is a likelihood that construction might run afoul of a site of cultural significance to the Tribe, this Court must ultimately decide where those culturally significant lands lie. There is at least some evidence in the record that they do not traverse the entirety of DAPL. For example, Jon Eagle, the Tribe's current THPO, indicated prior to this litigation that at least some of the pipeline did not fall within the scope of what he considered ancestral tribal lands. See Chieply Decl., Exh. 14 (Letter from Jon Eagle to Martha Chieply on Mar. 22, 2016) ("Most of the DAPL pipeline route crosses Lakota/Dakota aboriginal land."); see also ECF No. 11-7 (Declaration of H. Frazier). This Court may not enjoin an action that the Corps has authorized by guessing at whether an interest of the Tribe might be affected. Instead, Plaintiff bears the burden to demonstrate that the permitting it seeks to have withdrawn would, in the absence of such relief, likely cause it harm. This it did not do for much of the pipeline.

So what activity remains subject to this Court's injunctive powers? Any permitted DAPL activity that the Tribe has shown will likely injure a nearby site of cultural or historic significance to the Standing Rock people. As previously explained, 204 sites were subject to PCN authorizations and thus were clearly permitted by the Corps. Those sites are in play. Other discharges into jurisdictional waters at hypothetical locations along the route, however, may also have been permitted under NWP 12 without a PCN process. But it would be pure speculation based on the current record to determine where such permitting occurred. The Tribe points the Court to no specific crossing of cultural significance that the Corps permitted under NWP 12 without a PCN verification. In fact, many of the pipeline crossings were not permitted by the Corps, sometimes because Dakota Access's use of HDD did not give rise to the dredge or fill activities that trigger federal jurisdiction under the CWA. For example, out of the five places in North Dakota that Dakota Access thought might require a PCN authorization, only three actually needed permitting at all. See Chieply Decl., ¶ 10. Of course, there may be many sites that the Corps permitted under NWP 12 that the Court has missed. But the burden is on the Tribe to indicate why this permitting must be enjoined to prevent an injury likely to occur to it. The Court, again, cannot guess that at some undefined locations there might be harm to the Tribe. It was Standing Rock's burden to point to the specific NWP 12 permitting that was likely to cause it injury. Standing Rock did not do so with regard to the permitting that has occurred outside of the PCN verified locations.

Returning to the 204 PCN sites, the vast majority must be excluded right off the bat. As previously noted, construction at 193 of the 204 PCN has already been completed. See Mot. Hearing Trans. at 24. For those sites, the die is cast. Whatever harms may have occurred from DAPL construction, the Court's intervention to enjoin the permitting now can no longer avoid them. As a result, the Court must deny the Tribe's request for an injunction as to permitting at those sites.

As to the other 11 PCN sites, the Tribe largely neglects to point the Court to any resources that may be affected by permitted activity. Plaintiff seeks to avoid its responsibility to identify a likely injury at these locations by claiming that this failure stems from the Corps' refusal to properly consult in the first place and thus should be excused. See Mot. at 37 n.17. At least with regard to some of these sites, however, the Corps did offer the Tribe the opportunity to visit the sites or even conduct its own surveys, and the Tribe declined to do so. See Chieply Decl., ¶¶ 28-29. The record contains abundant evidence that the Corps also repeatedly sought other input on known cultural sites at these locations, and, in many cases, other tribes conducted site visits to search for any resources likely to be affected by the DAPL work. Id. The Tribe cannot now ask the Court to speculate that there would be a likely injury at these places by claiming that it was prevented from assessing these sites.

These sites are also subject to several additional restrictions that make it unlikely that construction will damage or destroy sites of cultural significance to the Tribe. First, the Corps attached restrictions to its PCN authorizations. These restrictions mandate that tribal monitors and archaeologists be allowed at these sites to look for any evidence of previously overlooked resources whenever construction is happening. See ECF No. 6, Exhs. 33-36 (PCN authorizations). GC 21 will also require that Dakota Access stop work until any unanticipated discovery can be evaluated for its historic and cultural significance by the Corps and the SHPO. See NWP 12 at 10,184. Standing Rock, too, will have the right to be involved in that verification process. Id. Given all these precautions, and the Tribe's failure to point the Court toward any evidence that a particular resource will be injured by this work, the Court must conclude that Plaintiff has not met its burden to show that irreparable injury is likely to occur without an injunction against this permitting.

And then there was one: Lake Oahe. This is the sole permitting that the Tribe might arguably show is likely to cause harm to cultural or historic sites of significance to it. As previously discussed, Lake Oahe is of undeniable importance to the Tribe, and the general area is demonstrably home to important cultural resources. Even here, though, the Tribe has not met its burden to show that DAPL-related work is likely to cause damage. The Corps and the Tribe conducted multiple visits to the area earlier this year in an effort to identify sites that might be harmed by DAPL's construction. See Eagle Decl., ¶¶ 13-14; Harnois Decl., ¶ 29. While the Tribe identified several previously undiscovered resources during those visits, these sites are located away from the activity required for the DAPL construction. See Harnois Decl., ¶ 29. Ultimately, the Corps considered these findings and determined that they would not be affected by the permitted activity. Id., ¶ 33. Most importantly, the North Dakota SHPO concurred in this opinion after having toured the site as well. See Harnois Decl., ¶ 34.

Several factors unique to the site also support this conclusion. The area around the permitted activity has been subject to previous surveying for other utility projects. See Mahmoud Decl., ¶¶ 18-19. DAPL likewise will run parallel, at a distance of 22 to 300 feet, to an already-existing natural-gas pipeline under the lake. Id.; see also Mot. Hearing Tran. at 25. Dakota Access will also use the less-invasive HDD method to run the pipeline, which will require less disturbance to the land around the drilling and bury the pipeline at a depth that is unlikely to damage cultural resources. See Howard Decl., ¶ 7; see also Mahmoud Decl., ¶ 19. Indeed, the Corps concluded that this method would not cause structural impacts at sites away from the direct drilling, and the Tribe presents no evidence to the contrary. See ECF No. 6, Exh. 51 (Omaha District Envtl. Assessment) at 78-79. Any temporary disturbance to the atmospherics around the site, moreover, will not be irreparable as they will be removed once the construction is complete. Finally, like the other PCN sites, there are several protective measures in place to assure that the Tribe and others will be able to monitor the construction activity to protect any previously unidentified resources.

For all of the above reasons, the Tribe has not carried its burden to demonstrate that the Court could prevent damage to important cultural resources by enjoining the Corps' DAPL-related permitting.

IV. Conclusion

As it has previously mentioned, this Court does not lightly countenance any depredation of lands that hold significance to the Standing Rock Sioux. Aware of the indignities visited upon the Tribe over the last centuries, the Court scrutinizes the permitting process here with particular care. Having done so, the Court must nonetheless conclude that the Tribe has not demonstrated that an injunction is warranted here. The Court, therefore, will issue a contemporaneous Order denying the Plaintiffs' Motion for Preliminary Injunction.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: September 9, 2016

ATTACHMENT 2

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, SEPTEMEBER 9, 2016
WWW.JUSTICE.GOV

OPA
(202) 514-2007
TTY (866) 544-5309

JOINT STATEMENT FROM THE DEPARTMENT OF JUSTICE, THE DEPARTMENT OF THE ARMY AND THE DEPARTMENT OF THE INTERIOR REGARDING STANDING ROCK SIOUX TRIBE V. U.S. ARMY CORPS OF ENGINEERS

WASHINGTON - The Department of Justice, the Department of the Army and the Department of the Interior issued the following statement regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*:

"We appreciate the District Court's opinion on the U.S. Army Corps of Engineers' compliance with the National Historic Preservation Act. However, important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally, remain. Therefore, the Department of the Army, the Department of Justice, and the Department of the Interior will take the following steps.

"The Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws. Therefore, construction of the pipeline on Army Corps land bordering or under Lake Oahe will not go forward at this time. The Army will move expeditiously to make this determination, as everyone involved — including the pipeline company and its workers — deserves a clear and timely resolution. In the interim, we request that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe.

"Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes' views on these types of infrastructure projects. Therefore, this fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.

"Finally, we fully support the rights of all Americans to assemble and speak freely. We urge everyone involved in protest or pipeline activities to adhere to the principles of nonviolence.

Of course, anyone who commits violent or destructive acts may face criminal sanctions from federal, tribal, state, or local authorities. The Departments of Justice and the Interior will continue to deploy resources to North Dakota to help state, local, and tribal authorities, and the communities they serve, better communicate, defuse tensions, support peaceful protest, and maintain public safety.

"In recent days, we have seen thousands of demonstrators come together peacefully, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites. It is now incumbent on all of us to develop a path forward that serves the broadest public interest."

# # #

ATTACHMENT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

DECLARATION OF DAVE ARCHAMBAULT II IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Dave Archambault II, declare as follows:

1. My name is Dave Archambault II, and I have served as Chairman of the Standing Rock Sioux Tribe since 2013. I also had the privilege of serving on the Tribal Council from 2007 until 2011. Before that, I worked at United Tribes Technical College as the director of the Tribal College Consortium for Developing Montana and North Dakota Workforce, a project that focuses on developing the workforce in Indian Country through Tribal College training and industry partnerships.

2. The Standing Rock Sioux Tribe is comprised of approximately 18,000 enrolled members. Roughly half of our members live on the Tribe's reservation in North and South Dakota. Most of the remainder live nearby and maintain cultural and family ties to the Tribe.

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3. Circumstances on Standing Rock are challenging, and our resources and opportunities are limited. The unemployment rate is over 60%, and the poverty level is over 40%. Although we have schools, the graduation rates are very low. Be that as it may, what we do have – our culture, water, and land – is important to us.

4. President Obama visited Standing Rock in 2014, becoming only the fourth President in the history of the nation to visit an Indian Reservation. As Chairman, I led the President through the visit. The Tribe conducted ceremonies and dances near the confluence of the Cannonball and Missouri Rivers, very close to the proposed pipeline route. The President saw our dances. The President met with, and was moved by, our youth – their struggles. Despite their struggles, one of our youth sang an "encouragement song" for the President, that the President may have strength to endure the challenges of his position. That is part of who we are.

5. The Standing Rock Indian Reservation is my home. It's where I live with my wife and two children; where my wife and I operate a small convenience store for the community; where I attended high school and college; and where I hunted, fished, and garden. Standing Rock is the focal point of my history. For many of our members, hunting and fishing are not just for sport, but rather supplement their sustenance needs. "Mitakuye oyasin" – "we are all related" – through hunting and fishing, our culture teaches members to respect and appreciate the value of all life. That from the animal's life, comes our life.

6. As Tribal Chairman, and as a member of the Tribal Council, I strive to create an environment on Standing Rock where as many people as possible can live a life worth living; a place where my people remember, and build upon, their history. History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity

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remains is derived from our cultural and historic sites. It is very important to the Tribe, and it is very important to me personally, to maintain a connection with this history and culture.

7. The elements of a life worth living are so personal, but generally include the availability of nutritious food, adequate housing, education, purpose, the love and companionship of family and friends, and water.

8. We believe that we are all connected, that all life has a spirit and is related – the people, the air, the landscape, the water. Water also has a spirit and nourishes all life. It is the common element of our spirits. Contaminating the water would contaminate the spirit.

9. DAPL came to meet with our Council in late 2014. They declared the pipeline route they chose, without our input. That is not consultation. That is not respect. And their doing so, is certainly not a government-to-government relationship. We immediately expressed our concerns with the manner in which this projected was presented to us. We expressed our opposition to the route that was planned without our input and suggested alternate routes. Our comments fell on deaf ears.

10. My nation's water, and my nation's history, are at risk from the pipeline.

11. Our water is at risk because a pipeline, through which more than half a million gallons of oil per day shall flow, is being built across the Missouri River, just north of our nation's border.

12. When the pipeline leaks, the Missouri river - the source of our drinking water, where we fish, swim, and conduct ceremonies – will be contaminated. Our Sundance, a spiritual ceremony sacred to us, is performed on the banks of the river. The source of life, as well as spiritual continuity, would be damaged. This water is very important to me personally, and pollution of the water would be deeply harmful to me. This is true of the members of my family,

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and the Tribe generally.

13. Several years ago, over the Thanksgiving Holiday, the water plant intakes malfunctioned, and the reservation was without water for seven days. Our people had to travel, at great expense, to buy water. Medical facility patients had to be moved. That was just a drought. An oil spill, and its effects on the water and our shorelines, would be even more devastating

14. My nation's history is at risk because the pipeline builders and the Army Corps failed to consult the tribe when planning the pipeline, and routed it through areas of cultural and historic significance, which will be destroyed.

15. Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost. This lost connection to our history and culture is deeply harmful to me and the members of the Tribe,

16. DAPL planned the entire route and conducted cultural surveys with no input from or consultation with the Tribe. The Corps' lack of consideration of our Tribe was evidenced in the draft EA which didn't even indicate the presence of our reservation, a half mile away, even though by that time we had written numerous letters to the Corps about our concerns with the project. I find that offensive.

17. The proponent of the pipeline diminishes the importance of our Municipal, Rural, and Industrial Water System, which draws water from the river and supplies most of the drinking water on the reservation, by incorrectly stating, "most tribal members who live in rural districts on the reservation still use well water." Most members actually live in districts, not rural areas, and rely on MR&I water drawn from the river, not well water.

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18. Our tribe would not sign the Army Corps Programmatic Agreement on historic properties because the terms of the agreement are inconsistent with tribal values and our interpretation of government to government relationships. In our culture, relationships are about respect – between individuals and between governments. We acknowledge each other's value as human beings. We do not impose on each other. Everyone's opinion matters. The pipeline proponent and the Army Corp came up with plans to build a pipeline that would threaten our water and culture, without consulting us on the creation or implementation of the plans, and wanted us to just sign off. That is neither respect nor consultation. That is going through the motions and checking off boxes.

19. We have repeatedly sought to work with the Corps to help them understand our perspective on the pipeline and the risks it presents. I personally walked the Omaha District Commander through the site several months ago. I thought at that time that they had begun to understand the impacts to tribal cultural and life that were being put at risk. We have written many letters. I have met with many government officials in North Dakota and Washington, D.C. , including my elected representatives, officials with the Environmental Protection Agency, Department of Interior, and Advisory Council on Historic Preservation. I have done all of these things because of the serious injury that will be caused to the Tribe's members if the pipeline is built where it's proposed, without adequate consultation to protect our interests.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on August 3, 2016, at Fort Yates, North Dakota.

Dave Archambault II

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing *Declaration of Dave Archambault II In Support of Motion for Preliminary Injunction* with the Clerk of the Court using the CM/ECF system

I further certify that on August 4, 2016, true and correct copies were served on the following, via the method indicated:

Via Federal Express overnight delivery:

Office of the Attorney for the District of Columbia
441 Fourth Street NW
Washington, DC 20001

U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

U.S. Attorney's Office
Attn: Civil Process Clerk
555 Fourth Street NW
Washington, DC 20530

Office of the Attorney General
1350 Pennsylvania Avenue NW, Suite 409
Washington, DC 20004

Courtesy copies via email to counsel Dakota Access Pipeline and U.S. Department of Justice Environment and Natural Resources Division.

/s/ Jan E. Hasselman
Jan E. Hasselman

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ATTACHMENT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

DECLARATION OF JON EAGLE, SR. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. QUALIFICATIONS AND RELEVANT EXPERTISE

1. My name is Jon Eagle Sr. I am the Tribal Historic Preservation Officer ("THPO") for the Standing Rock Sioux Tribe ("SRST"), and an enrolled member of the Tribe. The Standing Rock Sioux Tribe is located in both the States of North Dakota and South Dakota and is home to the Hunkpapa and Sihasapa bands of Lakota Oyate and the Ihunktuwona and Pabaksa bands of the Dakota Oyate. We are a member tribe of the Oceti Sakonwin, also known as the Great Sioux Nation. I was appointed by the SRST Council to serve in this capacity on February 8th, 2016.

2. The SRST/THPO office is authorized by the National Historic Preservation Act,

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1992 amendments, to include the Native American Graves Protection And Repatriation Act, Archaeological Resources Protection Act, Antiquities Act of 1906 and the Standing Rock Sioux Tribes Cultural Resource Code, Title XXXII. The SRST/THPO is a regulatory office that manages and protects cultural resources, sacred areas, and sites within the exterior boundaries of the Standing Rock Sioux Tribe to include the original boundaries of the Fort Laramie Treaties of 1851 and 1868, and the aboriginal homelands of the Oceti Sakonwin.

3. I have twenty-six years of experience working with children, families and communities and seventeen years of experience consulting with tribal, state and federal agencies. After studying Sociology at Fort Lewis College, in Durango, Colorado, I returned home to Sitting Bull College where I finished a Bachelor of Science Degree in General Studies. I have two years of experience working with the SRST/Elders Preservation Council to identify and evaluate Stone Features, stone cairns, and stone effigies. Since my appointment I have attended the Advisory Council on Historic Preservation, National Historic Preservation Act, Section 106 Essentials and Advanced training in Denver, Colorado.

4. I am a descendant of the Oceti Sakonwin and come from the Hunkpapa Oyate. I speak the Lakota language and am considered to be knowledgeable of our cultural and spiritual laws, oral history, and sacred knowledge and have been asked by my people to serve in the traditional leadership of our people.

5. I was born in Minneapolis, MN and returned to Standing Rock with my parents at the age of 2 and have lived here since then, only leaving to serve in the United States Army and to attend college. I have dedicated over twenty six years of my life to helping my people.

6. In 2014, the Cheyenne River Sioux Tribe honored our relationship with the Buffalo Nation. It was at this traditional gathering that I heard Tim Mentz of Makoce Wowapi,

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LLC., talk of stone features. During his presentation he showed a drawing of a site in North Dakota that his company found while conducting Class III Cultural Surveys near Williston, North Dakota. The site was of religious and cultural significance to the Oceti Sakonwin. He told us that the day after his company had identified and evaluated the site, an official from a federal agency told the land owner what was found. The next day, the land owner went through the site with a bulldozer and destroyed the site.

7. It's hard to put into words how this news made me feel. The only way I can describe it is by saying it hurt. A deep, spiritual hurt that someone would have a total disregard for who my ancestors were and the connection to who we are as a people today. We will never have the opportunity to go back there and see what our ancestors left for us. It is gone forever. It was at this point in my life that I became aware of not only what my ancestors left on the land for their grandchildren, I also became aware of the destruction of sites of religious and cultural significance to the Oceti Sakowin in the name of development. This incident is what motivated me to apply for the position of the Standing Rock Sioux Tribe, Tribal Historic Preservation Officer.

8. Upon assuming the duties of SRST/THPO, I immediately became immersed in Historic Preservation and have since consulted with several State and Federal Agencies, all of which were fulfilling their responsibilities to the Section 106 Process. I have read and became familiar with correspondence to the United States Army Corps of Engineers by my predecessor, Ms. Waste Win Young., and the Chairman of the SRST, Dave Archambault II. It was after reading those letters that it became clear that the Section 106 Process being implemented by the Corps was fundamentally flawed. I have also reviewed and am familiar with the draft and final Environmental Assessment and the cultural surveys prepared by DAPL.

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9. As keepers of sacred knowledge, we have a responsibility to the next seven generations to ensure that they have good land, clean water, and clean air. The Draft EA made no mention of the people of Standing Rock who would be directly affected should the pipeline leak. Energy Transfer like any other pipeline assures that they are safe and yet we hear almost weekly of a pipeline that has leaked. The recent leak of Keystone 1 near Freeman, South Dakota clearly demonstrates the potential for a manmade disaster. Like the proposed Dakota Access Pipeline, Keystone 1 had safety measure in place to alert pipeline officials of a leak, and yet over 16,000 gallons of oil leaked without their knowledge. It was a farmer who noticed the sheen from the oil in a ditch.

10. It's not a matter of if; it's a matter of when that pipeline will leak. It won't be my generation that will have to deal with the manmade disaster when it occurs, it will be my children or my grandchildren. They are the future of our people and as such are not expendable.

II. THE LAKE OAHE SITE

11. The confluence of the Cannon Ball River and the Missouri River is a site of religious and cultural significance to the Oceti Sakonwin. The Cannon Ball River was known to my ancestors as Inyan Wakan Kagapi Wakpa (River Where the Sacred Stones Are Made), and the Missouri River was known as Mni Sose (Turbulent Water). The force of those two rivers coming together formed perfectly round stones once considered sacred to the Mandan, Arikara, Cheyenne and the member tribes of the Oceti Sakonwin. When the Corps dredged and altered the course of the Cannon Ball River the river, that undertaking had an adverse effect at the confluence and the rivers quit making the sacred stones. We will never again see this phenomenon again.

12. The area within and around the horizontal directional drilling site, where the pipeline is going to cross the Missouri River, is considered sacred by many tribes to include the

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Mandan, Arikara, Cheyenne and Dakota. At this site, traditional enemy tribes camped within sight of each other and never fought because of the reverence they had for this Traditional Cultural Landscape. Over the years, several Sun dances have occurred in the area because of the sacred nature of the rivers and the land. The member tribes of the Oceti Sakonwin have seven sacred rites given to us by the creator and the Sundance is held to be one of the most sacred.

13. Three site visits occurred at the Historic Cannon Ball Ranch in connection with the DAPL proposal, which currently owns the land where the horizontal directional drilling ("HDD") on the west side of Lake Oahe would take place. The first visit was attended by my staff and I only, the second visit the Standing Rock Sioux Tribal Chairman escorted Colonel John Henderson, Commander of the Omaha District Army Corps to the ranch, and the third visit was with archeologists from the Corps and my office. During the visit with the USACE archeologist, the SRST/THPO Section 106 Coordinator, LaDonna Brave Bull Allard, shared the rich history of this area by pointing out village sites of the Mandan, Arikara, Cheyenne and Ihunktuwana. We described how these tribes who camped peacefully within view of one another were traditional enemies, but because of their reverence for this sacred place there were no wars fought or blood spilt on the land. This site was also a historic place of commerce where the tribes would gather during times of peace to trade with one another.

14. Evidence of their existence is still on the ground. While walking through an Arikara Village site, Dr. Kelly Morgan, SRST/THPO Archeologist, pointed out places where moles had pushed the dirt to the surface. In this mole dirt, we found pottery shards, pieces of bone, flint and tools used for scraping hides and cutting. Both Dr. Morgan and Ms. Allard pointed out that many of the sites we were witnessing had not previously been recorded. During our visit I asked the opinion of Rick Harnois, USACE Archeologist if the sites that were pointed

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out to his staff were previously known at which point he told me no, they were not recorded. I also asked if they should be recorded, and he said yes. I then asked him his opinion on what was happening with DAPL and he said what was going on is wrong. However, none of what was spoken about at the site made it into his determination of, "No Historic Properties Subject to Affect."

15. Also in the area is a sacred stone where our ancestors went to pray and ask for guidance. As a Lakota, I have been fortunate enough to have traveled to this area with elders who are no longer with us, to pray and leave offerings, asking for good direction, strength and protection on behalf of our people. In an interview conducted in the late 1800's by Colonel A.B. Welch, a warrior spoke of the sacredness of the area, "It was there when we came across the Missouri. I think it had been an Arikara stone. I think they found it first. They put things there, too. No one would strike an enemy around that place. Everyone was safe there. There were always many presents there. There were weapons and things to eat and valuable cloth on sticks. There were buffalo heads there, too, for meat to come around. It is very holy. It is there yet. I do not want to talk much about it." A.B. Welch Collection. The site of this stone is confidential and protected by this office. It must be noted that this is a place of prayer that is still in use today. A place where people indigenous of this continent continue to go for good direction, strength, and protection for the coming year. The HDD drilling, staging of equipment and construction will have an adverse effect on the audio, visual, and atmospheric elements of a Traditional Cultural Landscape and a site of religious and cultural significance to the Oceti Sakonwin.

16. During our visit to the site, we noticed several undocumented stone features and rock cairns that need further study. The knowledge required to identify and evaluate stone

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features, stone cairns, effigies, etc., lies within the cultural and spiritual protocols of the Oceti Sakonwin. It relates to our creation stories and star knowledge which has been passed down from generation to generation. As a Lakota who has been taught by my elders, I can tell when the first day of winter, spring, summer and fall are just by looking at the stars. I can also tell when my ancestors visited the sacred places by the orientation of the stone features in relationship to star constellations. We have a belief that what happens above happens below and what happens below happens above. Archeologists lack the cultural awareness and sensitivities to identify sites of religious and cultural significance to tribes. Only the tribes themselves have that ability.

17. We believe that along the entire 1,100 route of the pipeline, there is great potential for eligible sites. After reading the surveys prepared by DAPL, it is apparent to me that the archeologist involved do not have the knowledge or cultural sensitivity to be identifying and or evaluating sites that are significant to the tribes. For example, in Williams County in North Dakota, survey crews identified a cairn and an associated rock feature on the top of a narrowing, rolling ridge above Beaver Creek in the Missouri River drainage system. Site 32WI1744 was declared, "Not Eligible," and recommended that no further work be done. The archeological report stated: "The proposed Dakota Access centerline crosses the site from west to east and passes roughly 30 ft. (9 m) south of the deflated cairn (F1) and 130 ft. (40 m) north of the rock feature. ROW blading and pipeline installation have the potential to impact the site by destroying F1. Because site 32WI1744 is recommended not eligible for listing in the [National Register,] no further work is required."

18. We disagree with this assessment. It is clear that the archeologists involved aren't aware of what they are looking at because if they knew that the deflated cairn was potentially a

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burial and the associated rock feature is a site of religious and cultural significance to the tribes, they'd know that by allowing the pipeline to go through this site this action will have an adverse effect on this site. The Standing Rock Sioux Tribe, Tribal Historic Preservation Office maintains our belief that there is a strong potential for adverse effects to site of religious and cultural significance to the tribes along the entire pipeline route.

19. In DAPL's cultural surveys, in many places the consultants identify a stone circle, or cairn, that they propose to "mitigate" pipeline construction impacts by fencing, signage and a 50 foot buffer. The assumption is that through this mitigation adverse effects to the site are avoided. The assumption is wrong. These are sacred sites. The attributes which make them sacred include the environment around them, and the context in which these sit. The regulations defining adverse effects include "Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance" and "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." A chain link fence and major industrial construction just 50 feet way—15 paces for a person of my size—would cause adverse effects to sacred sites. That's why it is important to include Tribes in not just the determination of the historic significance of sites, but a determination of adverse effects. Due to the Corps flawed process we have never been gotten pass the first step of the 106 process, much less had the opportunity to identify sites of religious and cultural significance to the tribes, not to mention never being invited to the table to assess or resolve adverse effects.

20. My elders have taught me to have a deep reverence for the land. We have a saying in our language, "Le makoce kin teunkilapi sni ki, hehan un Lakotapi kte sni." When translated this means, "When we no longer cherish the land, we will no longer be Lakota." We

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refer to the earth as Unci Maka, or grandmother earth, and are taught that she nourishes and nurtures everything that we need to thrive as a people. We are taught that everything has a nagi, or spirit. Nagi can also be translated to mean the spiritual essence of everything in creation as we believe that everything has a spirit.

21. On the land are cultural and spiritual laws that acknowledge the spiritual essence of everything in creation. At one time we only took what we needed. Whether it was wild turnips, choke cherries, deer, buffalo or traditional medicines, we always acknowledge the life and the sacrifice. These cultural and spiritual laws hold true to sacred sites, stone features, cairns, effigies, as there are laws that govern how we enter these sites.

22. The construction of the pipeline at the crossing of the Missouri River will have an adverse effect on the Traditional Cultural Landscape of the area. This is a site of religious and cultural significance to the people of Standing Rock that is still in use. Our people still travel to these sacred areas for prayer. Pipeline construction at this site will adversely affect culturally significant and sacred sites, either by destroying them outright, or by fencing them off in the immediate vicinity of industrial operations. This harms the Tribe, and harms me personally.

23. DAPL has a plan for dealing with “inadvertent discoveries” during pipeline construction. But if pipeline archaeologists can’t recognize important cultural sites, how can pipeline construction workers recognize them? It is not a substitute for proper consultation and identification. Similarly, the Army Corps has included a provision for including Tribal monitors at PCN sites. Of course, the Army Corps only imposes this requirement on a tiny area around HDD entry and exist sites, and not the pipeline to and from such sites. This requirement is of limited value. Full cultural surveys take time. We cannot walk in front of the bulldozers, on the company’s rushed schedule, and be expected to ensure the protection of these sites.

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III. SACRED AND HISTORIC SITES ELSEWHERE ON THE PIPELINE ROUTE

24. Wherever the buffalo roamed, my ancestors left evidence of their existence on the land. Mainstream society refers to them as nomadic but I don't believe this to be true, because to say a people were nomadic is to say that they wandered around aimlessly. My ancestors followed the buffalo and the buffalo followed the stars. They traveled as far west as Wyoming and Montana, as far north as the Canadian bush country, as far east as the Great Lakes, and as far south as Kansas. This territory was the aboriginal homelands of the Oceti Sakonwin.

25. Water is considered to be sacred. In our language we say, Mni Wiconi, or Water of Life, because without water there can be no life. For nine months our mothers carry us in water. We are primarily made up of water. Water is sacred to our people. We still have people who go to the water to pray and make offerings so that all life that is sustained by our rivers may live. People, deer, cattle, fish, birds, all life is considered to be sacred and is dependent upon the water from the Missouri River. The water ways of this nation were highways of their times as my ancestors traveled from lake to lake, river to river, stream to stream. Stone features, burial cairns and effigies can be found near water on the hill tops, along ridges, hills sides and drainages. In my experience, it is likely to find such features near water.

26. Protection of stone features is very important to the Standing Rock Sioux Tribe. On July 2, 2014 the Standing Rock Sioux Tribe passed resolution number 378-14, which reads as follows:

> NOW THEREFORE BE IT RESOLVED, the four (4) bands on the Standing Rock Reservation who are members of the original structure of Oceti Sakonwin claim all stone feature sites, our identified burial/places, stone alignments and effigies, our sacred landscapes and drainages that are connected to these sacred areas and sites, regardless of location, within our original homelands of Oceti Sakonwin: and
>
> BE IT FURTHER RESOLVED, that wherever the buffalo roam and left its evidence of occupation, use and bone material is considered Oceti Sakonwin

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homelands as we are considered the Buffalo Nation or people and that is where you will find our sacred areas, burials, stone effigies and stone alignments of our star knowledge and sacred stone feature sites that only member band so the original Oceti Sakonwin can claim.

27. We have prophesies that one day man was going to go too far and when that happened the animals were going to show their sacred color. This would be a signal for the grandchildren to go back to these sacred places of prayer and ask for guidance. We believe we are in this time of prophesy with the birth of a white buffalo calf in Jamestown, North Dakota and sighting of white deer, elk, moose within the aboriginal homelands of the Oceti Sakonwin.

28. Within our way of life, there are people who have the responsibility of keeping the oral histories and sacred knowledge of our people. This knowledge comes with strict laws on who, when, where and why these teachings are shared. The creation stories and star knowledge can only be told after the first day of winter and can no longer be told after the first day of spring. The fact that as a THPO, I will be asked to share cultural and spiritual laws out of context in an attempt to protect what is sacred to me will cause me, my children, grandchildren and those not yet born irreparable harm as these stories are not written down but have been passed down generation to generation. It is the keeping of this knowledge that helps us to protect sacred sites.

29. As a member of the Oceti Sakonwin it is imperative that we control our own narrative. My greatest concern is that non-Tribal archeologists are going to write down our stories, and cultural and spiritual laws, and assume they now have the abilities to identify and evaluate sites of religious and cultural significance to the tribes. They do not have that ability. I am in no way giving anyone the right to tell our stories or share our sacred knowledge.

30. Water was considered sacred by my ancestors, they referred to water as Mni Wiconi, or Water of Life, because without water there can be no life. The water ways of this country were the highways of the past. My ancestors traveled from lake to lake, river to river,

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steam to stream. It was at these sacred bodies of water that men stood in stone circles for four days, with no food or water, crying for a vision to guide their people. It wasn't the exposure to the elements or the hunger that was life threatening, it was the lack of water that was the greatest sacrifice and test for these men. These stone features can be found on ridges and drainages around water ways.

31. A large portion of the pipeline will cross private lands that our office do not have access to. This office was never afforded the opportunity to consult with the Corps or DAPL in the development of the draft EA, nor were we afforded the opportunity to assist in identifying sites of religious and cultural significance to our people.

32. In Iowa, a tribal cultural surveyor, Makoce Wowapi, LLC., was conducting Class III Cultural Surveys on behalf of the Upper Sioux THPO from Minnesota and found a site of religious and cultural significance to our tribe in the pipeline route. At the request of the Upper Sioux THPO, we traveled to Iowa to assist in identifying and evaluating the find. We were met by the Flandreau Sioux Tribe THPO, Upper Sioux THPO, elders, spiritual leaders, as well as archeologists from the State of Iowa, USACE, Iowa Division of Natural Resources and the Iowa SHPO.

33. Much to their credit, the non-Tribal archeologists waited while we took our elders and spiritual leaders to the site. After identifying and evaluating the site, a ceremony was held and a long discussion was held by our elders and spiritual leaders. In the end it was decided that I as the Standing Rock THPO was to share with the archeologist what was found and to escort them to the site so they could see for themselves.

34. After introductions, I told the archeologist that I was aware of the practice in the field to discredit stone features as glacial uplift. I told them that I was going to share cultural and

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spiritual teachings with them in an attempt to help them to see the error of their ways. I began by asking them where in their life do they see cycles. They spoke of sunrise to sunset, the changing of the seasons, birth to death, at which point I told them if all you see with are your eyes you will always be limited in what you perceive in this world, but, if you learn to see with your heart you will be able to acknowledge your relationship to everything in creation, going all the way out to the universe.

35. We were standing in a stand of trees and I pointed out that we were inhaling oxygen and exhaling carbon dioxide. I told them that the trees were exhaling oxygen and inhaling carbon dioxide. As we were standing there a light rain began to fall. I reminded them that water evaporates into the atmosphere and comes back as rain. I told them that this same sacred motion goes all the way out into the universe. The earth and planets revolve around the sun and the stars move in a circle as is evident by the known spiral galaxies. I told them this is just a glimpse into what we call, Cangleska Wakan, or the Sacred Hoop of Life, and then I showed them the site drawings at which point both the Iowa State Archeologist and Iowa SHPO both declared the site eligible for the National Registry as a site of religious and cultural significance to the tribes.

36. The site drawing showed a stone circle with rock cairns set in the four directions. I explained to them that this was a place where a warrior stood and fasted in prayer. It was also one of the hardest places to fast because it was set on a hill side as opposed to a flat surface, which would have caused this man great discomfort as he stood there in prayer for four days with no food or water. The rock cairns marked burials where men who were associated with this walk of life were buried.

37. We then escorted them to the site itself at which point the archeologist pointed out

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that they were aware of previous surveys and this site was never recorded. We pointed out that while conducting the surveys, the archeologist would have had to have literally walked right over the site. We told them this is why it was so important to identify tribes as consulting parties to the section 106 process as only the tribes had the ability to identify sites of religious and cultural significance.

38. Sara Childers, Upper Sioux THPO shared with this office a site map of a site identified by DAPL as 30BE0029. The site map clearly shows that the Dakota Access Pipeline will go straight through burial mounds and stone features without any consideration to how the tribes view sites such as this, which again, are sites of religious and cultural significance to the tribes. This site is a Traditional Cultural Landscape and must be avoided. It's not just the individual sites; it's the entire landscape that is considered sacred.

39. Of great concern to our office is the number of sites that are recorded as ineligible or unevaluated in the 2015 Cultural Resource Report prepared by DAPL's consultants. It is imperative that federal agencies when initiating section 106 consultations identify tribes as consulting parties to assist with identifying the Areas of Potential Affect and to identify sites of religious and cultural significance to the tribes. Non-tribal archeologists do not have the ability to properly assess sites they list as ineligible and/or unevaluated. By doing so, important sites lack federal protection, and development is allowed to cause irreparable harm to these sites. Without tribal participation in consultation we will continue to see adverse effects on sites.

40. Based on the above, it is my personal and professional opinion that DAPL will very likely destroy sites that are of great religious cultural significance to the Tribe. Some of the sites are identified but deemed ineligible for protection by people who are not competent to make that decision. Other sites remain undiscovered because there's never been any Tribal survey.

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DAPL is a linear, 1,100 mile pipeline that will cross waters of U.S. Corps and Civil Works projects in North Dakota, South Dakota, Iowa and Illinois. The landscape it crosses is rich in historic significance. Wherever we look for closely for these sites, we find them in abundance, especially near water. We have already seen the inadequacies of DAPL's private cultural surveys. We have already seen examples of important religious sites that were completely ignored by DAPL in the pipeline's path.

IV. THE TRIBE AND TRIBAL MEMBERS WILL BE IRREPARABLY HARMED BY PIPELINE CONSTRUCTION

41. As a veteran of the United States Army, it had long been a wish of mine to visit Arlington National Cemetery. In 1998, my wish came true. One of first things I noticed while entering this hallowed ground were the hushed tones of the people as they walked through the cemetery. I knew it was because here lay the men and women who fell in defense of this nation. It is with this same reverence that we, the descendants of the Oceti Sakonwin enter the sites where our ancestors fell in defense of our country. An elder once told me that our ancestors knew four hardships in life; to hear an orphan cry, to lose a child, to lose your mother, and to not know where a warrior fell. All across the aboriginal homelands of the Oceti Sakonwin are stone cairns that mark such places, and are considered to be sites of religious and cultural significance to our tribe. To me, and to members of the Tribe, destruction of or disrespect to these sites feels just like it would feel to me if a pipeline was dug through the middle of Arlington National Cemetery, turning over gravestones and displacing graves. Mainstream society would not tolerate the desecration of Arlington National Cemetery. But this is what DAPL is doing in the traditional lands of the Oceti Sankowin.

42. By way of comparison, recent events in the world show a total lack of appreciation and respect by ISIS for ancient sites in the Middle East. Every time they destroy an

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ancient site we lose a part of our collective history, that once destroyed is gone forever. It's not just happening in the Middle East, it's happening right here in America in the name of development, or in the name of the national interest. Every time a site of religious and cultural significance to the tribes is destroyed, this causes irreparable harm to me, my children, grandchildren and those not yet born. Once it is gone, it is gone forever.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on August 3, 2016, at Fort Yates, North Dakota.

Jon Eagle, Sr.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing *Declaration of Jon Eagle, Sr. In Support of Motion For Preliminary Injunction* with the Clerk of the Court using the CM/ECF system.

I further certify that on August 4, 2016, true and correct copies were served on the following, via the method indicated:

Via Federal Express overnight delivery:

Office of the Attorney for the District of Columbia
441 Fourth Street NW
Washington, DC 20001

U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

U.S. Attorney's Office
Attn: Civil Process Clerk
555 Fourth Street NW
Washington, DC 20530

Office of the Attorney General
1350 Pennsylvania Avenue NW, Suite 409
Washington, DC 20004

Courtesy copies via email to counsel Dakota Access Pipeline and U.S. Department of Justice Environment and Natural Resources Division.

/s/ Jan E. Hasselman
Jan E. Hasselman

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ATTACHMENT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

DECLARATION OF TIM MENTZ, SR. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. QUALIFICATIONS AND RELEVANT EXPERIENCE

1. My name is Tim Mentz Sr. I am an enrolled member, blood affiliation of *Hunkpapa* and *Pa Baksa* (Cuthead Dakota) bands, of the Standing Rock Sioux Tribe (SRST). I have lived most of my entire life on the Standing Rock Reservation. I was born on March 9, 1954, at home in a two-room log house along the Missouri River in the Cannon Ball district, one of eight communities on the Standing Rock Reservation. I currently reside in the district of Long Soldier which is part of the city of Fort Yates, North Dakota.

2. I worked for the SRST for 39 years, starting in the spring of 1977 in various

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positions until 2008. In the spring of 1996 the SRST submitted an application to the National Park Service (NPS) to assume certain responsibilities from the State Historic Preservation Officers (SHPO) from both North and South Dakota as provided in the 1992 amendments to the National Historic Preservation Act (NHPA). The SRST was the first federally recognized Tribe in the Nation to be certified to assume all SHPO responsibilities from both States; and I was appointed by my Tribe and recognized by NPS as the first certified Tribal Historic Preservation Officer (THPO) in the Nation in the fall of 1996. In August, 2008 I resigned my position as THPO for health reasons, completing 12 years of service as THPO for the SRST.

3. I also served on the Tribal Council for Standing Rock tribal government from 1991 to 1995. During my term on Tribal Council, I assisted in pushing the 1992 amendments to the NHPA that established Tribes assuming SHPO responsibilities to Section 106. I pursued these responsibilities because of my family ties to the land areas that were identified by the bands as Dakota territory which is in North and South Dakota, Minnesota and Iowa including parts of Canada. Within these areas are the tangible evidence of our people who used *Inyan* (stone) in conducting spiritual ceremonies and guided our way of life. These are the stone features that have some recordings in the archaeological reports of DAPL, i.e., stone rings, stone effigies, stone alignments, rock cairns to name a few that are numerous in these areas. I was fortunate to be born into a family who were society leaders of a warrior society (Red Hand Society) specific to our family, who knew where each band had their stone feature sites or commonly referred to as sacred sites. We knew our land very well.

4. In the spring of 2009 our family started a business registered in the State of North Dakota as Mentz-Wilson Consultants, LLC; dba is Makoche Wowapi. Currently, our company has been working in Cultural Resource Management (CRM) in the Great Plains for 7 years as

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consultants in the fields of Archaeology and Tribal Cultural Resource Management conducting archaeological and/or Tribal identification survey work within the States of North and South Dakota, Minnesota and Iowa. We have documented and recorded thousands of "historic properties of religious and cultural significance to tribes" primarily in the bakken region and west and east of the Missouri River.

5. In 2014, the Standing Rock Sioux Tribe (SRST) passed a resolution that establishes Makoche Wowapi as their preferred contractor for all Federal, State, Tribal and Private Undertakings within our aboriginal homelands regardless of location. We have represented the Standing Rock Sioux Tribe in the identification process through surveying within and outside the reservation boundaries administering that responsibility to find stone feature sites or areas significant to the SRST. We have extensive experience assisting in the THPO and government-to-government consultation and I have assisted other *Oceti Sakowin* tribal THPOs in addressing the identification and evaluation process for our sites to be listed on the National Register of Historic Places. Most projects we service are federal projects that have a federal nexus or specific to federal land managing agencies complying with the NHPA.

6. I have 31 years' experience in CRM working in six states as well as Canada, conducting or participating in the archaeological work and in the identification of religious and cultural significant historic properties. Together with my wife, who co-owns the business, I maintain a staff of 15 individuals with most staff having 7 years or more of experience in surveying specific sites and in identification and recordation of sites significance to the SRST. My title in the business is Projects Manager for all proposed Federal, State, County, Private and Tribal Undertakings conducting and managing field surveys. I have National Environmental Policy Act (NEPA) training and advanced NEPA training provided by Region 8, EPA in Denver,

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Colorado. I also attended training in Section 106 provided by the Advisory Council on Historic Preservation (ACHP) and have been a trainer in Section 106; assisted the Federal Law Enforcement Training Center in providing Archeological Resources Protection Act training for 2 years on the Standing Rock Reservation for regional law enforcement, THPO tribal monitors and Federal and State Game and Fish wardens. We also assisted THPOs and entities in survey work to meet the requirements in particular to the identification of "historic properties of religious and cultural significance" to Tribes as provided in Section 101(d)(6)(B) of the NHPA. This allows the Federal agencies to have this data our company generates from the identification phase to assist in the consultation requirements between Federal agency officials and Tribes on any Federal undertaking and within the evaluation process in Section 106.

7. I have reviewed several documents related to the Dakota Access Pipeline (DAPL), including the Environmental Assessment of the Army Corps of Engineers and the U.S. Fish and Wildlife Service; and reviewed the Class III Archaeological Reports generated by the consulting firms in segments of the entire 1,200 mile route of the proposed Dakota Access Pipeline. I have reviewed the documents the consultants submitted especially reviewing their determinations and recommendations to the lead federal agency. I have also reviewed the determinations of effects letters generated by Army Corps and U.S. Fish and Wildlife sent to the various State SHPOs and disagree with their request for concurrence. I am very familiar with the landscape through which the pipeline is proposed to travel, especially in North and South Dakota.

II. HISTORIC SIGNIFICANCE OF STONE FEATURE SITES

A. Spiritual Use and Significance Of Stone Features

8. The 1992 amendments to the NHPA allow the tribes to assist in the identification of "historic properties of religious and cultural significance to tribes" when there is a Federal

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undertaking. The Standing Rock Sioux Tribe by resolution # 378-14 has claimed association to all stone features that are located *"wherever the buffalo roamed and left its evidence of occupation, use and bone material is considered Oceti Sakowin homelands as we are considered the Buffalo Nation or people and that is where you will find our sacred areas, burials, stone effigies and stone alignments of our star knowledge and sacred stone feature sites that only member bands of the original Oceti Sakowin can claim…"*

9. In providing data and information, we sometimes are asked to step out of our spiritual protocol to create understanding in our connection to *Unci Maka'* or Grandmother Earth; to describe the significance of how strong our spiritual walk of life was as some of these sites date to 1,500 years or more within the Great Plains; and that are running concurrent with all living creatures and the environment especially the most important medicine to all living, *Mni Wiconi* or Water of Life. I shall step out of our spiritual protocol to describe our connection to the stone features that the corridor of DAPL dissects and are located adjacent to both sides of these drainages, rivers, streams, natural springs and areas where the one spirit is located important to the bands residing on the Standing Rock Reservation. These stone feature areas are all over within the Great Plains and have been documented by archaeologists and Tribal consultants like Makoche Wowapi. These important stone features can be found from the foothills east of the Rocky Mountain range to north up to the bush country in Canada, to east up to the Great Lakes and south to the Gulf of Mexico. *Oceti Sakowin* placed their prayer sites and burials there as evidence of our existence.

10. For the Lakota/Dakota, spirituality provided the ultimate guide for structured daily living; it was through our spiritual practices that the *Oyate* gained understanding of how we should live with creation and its inhabitance. This heritage of the Lakota Dakota *Oyate* (People)

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included a balance between the four forces of Mother Nature, the people's livelihood, and the spiritual movement of the people and animal nations during each season of the year. This spiritual belief system evolved over time beginning with the use of the stone people (*Inyan Oyate*) in our creation story and developing to include the twelve grandfathers, the stone ring or *wa hocho'ka* and the sacred white buffalo calf pipe housed today at Green Grass, South Dakota located on the Cheyenne River Reservation.

11. The stone features that remain here throughout the northern plains are tangible evidence of a highly structured spiritual walk of life practiced by our people whose spiritual advisors and medicine people strictly followed and maintained the protocols established by the Grandfathers. Appointed individuals used the natural powers of Mother Nature through a guided walk of life chosen for them by the spirits; "they were picked." Stone features, such as the ones discussed here within and near the pipeline corridor of the Dakota Access Pipeline, are where these individuals made commitments for the people and where spiritual pledges were fulfilled.

12. Use of a specific site was conducted with the guidance of a person's spiritual advisor using his gift or spiritual bundle. In this way, these stone features enabled the individual, following established protocol, to step into his chosen spiritual portal to communicate with *Tunkasina* (Grandfather). Such individuals found vital spiritual connection through prayer and commitment at these stone features and it was through these individual commitments made by people in the band or *tiospaye* that the Lakota/Dakota *Oyate* sustained itself. Our spiritual practitioners gave themselves to the greater power so the people may live and it happened at these stone feature sites of the Lakota/Dakota *Oyate*.

13. With the fasting or vision quest (*Hanbdeceya*), an individual would pursue and may achieve one of the seven sacred rites given by the White Buffalo Calf Pipe Woman who

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brought the *Oceti Sakowin* bands of Lakota/Dakota/Nakota our most sacred *canupa* (pipe). The significance of the vision quest starts with the stone ring and stone features using a canupa, where individuals made the commitments and pledges that would guide them through their life. When used with the Sacred White Buffalo Calf Pipe, these stone features enhanced an individual's connection to the spiritual side of all living creation, all those that have a spirit or *na' gi*.

14. The numerous stone rings within North and South Dakota, Minnesota and Iowa are Hanbdeceya or fasting rings. Because the DAPL corridor crosses over countless waterways and drainages along nearly 1,200 miles, destruction of some number of these prayer sites is certain. The presumption that stone rings are "tipi rings", as they are commonly referred to within the archeological community, is a term that is categorically false and has no meaning to the Lakota/Dakota *Oyate*. These stone rings, arcs, stone alignments, and in particular buffalo effigies are the tangible evidence of our spiritual walk of life of member bands of *Oceti Sakowin* and is referenced in resolution #378-14 of the SRST.

15. Every stone ring is a *wa hocho'ka*, or fasting stone ring, representing a spiritual portal for the individual who used it in seeking a vision and spiritual understanding from *Tunkasina*. When Societies gathered to pray their stone rings were connected in multi layers, depending on the number of members, to pray with one heart and one mind for the protection of the *Oyate*. The intent of a spiritual practitioner using a stone feature was to grasp Mother Nature's gifts of the four forces of nature resting in each cardinal direction. In doing so, he was dependent upon using a particular cardinal gate that opened his cardinal direction. This individual also used specific colors at his cardinal gate to identify which of the four directions he was using. The color of the stones showed his walk of life and was configured in different ways

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depending on what an individual was seeking. The star constellations also played a significant role in making spiritual commitments, particularly at leadership levels. Generally a constellation's physical characteristics are referenced at the site that guided a practitioner's purpose or goal in life.

16. From the start of their life, boys had to stand and fast in one of these stone rings or *wa hocho'ka* to receive direction in their future roles – as young men, within their band, and within their life in general. As men advanced in their life ways, society membership was decided by an individual's daily action and his spiritual commitment to himself, his family, his society and people. The stone circle he once stood in alone, as an individual, might one day later be attached to a relative, society member, leader or clan's vision/fasting ring. If spiritually directed, additional rings, arcs, stone effigies or alignments were added on to the initial ring. Medicine bundles were also created only at these stone feature sites and were based off of gifts that were given to the medicine people by the Grandfathers. When a man died, his *wa hocho'ka* was also his final grave site; his *na gi'* (spirit) returned to the place that had helped him commit to the course of life chosen for him and in so doing, he was again helped on his final journey to meet the grandfathers. He was either physically brought to his stone ring or his spirit was kept and returned to this site generally marked by or referenced as a stone cairn. These attributes cannot be mitigated or minimized to the satisfaction of today's development in the Great Plains. It's the members of *Oceti Sakowin* that end up paying the ultimate price from this destructive development.

17. To this day, each of the cardinal directions has a specific use for our spiritual advisors and continues to provide direction with men and women's spirituality on a daily basis. However, when the *Oyate* (or people) were forced underground with their spirituality in the late

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1890s, people had to hide and pray indoors or in secret and conduct ceremonies within the confines of their houses because they didn't have access to the special areas they once traveled to pray at their individual stone ring site; the stones were then replaced by tobacco ties. Although the use of the four cardinal directions and their colors has survived the passage of time for our *Oyate*, the use of star constellations, forces in the landscape, and stone features connected with our spiritual teachings and the four forces of Mother Nature, is not common knowledge among the archaeologists or Federal Preservation Officers but only with our *Oyate*.

18. Today for the Lakota/Dakota, it is rare to find individuals who have reached an important level of spiritual achievement because they are denied access to their family or society sacred sites and are not willing to document any of this knowledge within his/her life time because of the pledge to keep this oral knowledge secret. Therefore, outside of the features themselves, very little of this information on the spiritual use of stone features has been documented, let alone provided in a public setting. But it is still kept orally and passed down from generation to generation.

19. Sadly, our *Oyate* cannot visit most of these places of power today. Yet a connection to the stone features remains within the sacred bundles derived from these places. Since many care takers of generational family bundles exist, it is important for bundle keepers to remain connected to these stone features. Unfortunately, when any type of development or project destroys a sacred stone ring or feature today, it inadvertently destroys the power of any sacred bundle connected to that place and ultimately severs the tie between the *Oyate* and the landforms where our spiritual power resides, this is an intangible adverse effect. There is no "fix" in mitigation for these types of sites. Destruction of these sites will eventually destroy generations of family connections to these areas of spiritual power that we still have knowledge

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of where they are located and how they still can be used, but are not there anymore. For this reason, steps taken to preserve sites like this are important to the survival and recovery of our spiritual traditions for our people, as these sites still retain the ability to mend our people, as prophesied by our spiritual advisors. But the sites need to remain in their place undisturbed.

B. *TiWakan* (Sacred Lodge)

20. Understanding of star constellations is critical to understanding the structure and purpose of the societies that used many of the stone features in this area and that are central to the Lakota/Dakota *Oyate*. The societies and constellations associated with them play a vital part in both men's and women's role in life, status within the *Oyate* and even in death.

21. These constellations were the portal or spiritual openings that allowed man and all living things to connect to the spirit of Mother Nature. One can say that the stone features associated with these constellations represent the genesis of one's self, his/her spirituality and cultural heritage. These constellations guide the timing of when spiritual ceremonies for individuals are initiated or conducted. I shall provide you an explanation of just one constellation that is at the center of this discussion and is found near Tioga where the corridor runs for DAPL.

22. It is important that I clarify the stone ring that most archaeologists commonly call tipi rings. They are not tipi rings and it is upsetting to hear such nonsense. They do not hold down a tipi cover as archaeologists defend. This is the best they can do to describe why they are common almost everywhere where you have undisturbed land in the Great Plains. The stone ring is tied to our creation story of our dwelling or Tipi lodge. The Lakota have specific star knowledge amongst the bands of the Teton. The Dakota oral history and knowledge revolves around our Tipi which is the center of our genesis story and is identified as the star constellation *TiWakan* or sacred lodge. This is the same constellation many people recognize as Orion the

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Hunter out of Greek mythology. For Dakotas, the twelve grandfathers are the sacred foundations of the twelve poles that make up *TiWakan* and can be recognized and visible in the stone ring and stone features that DAPL will destroy if further work continues.

23. Because the Tipi was truly the woman's home, every part of it had a spiritual connection to the woman who created the spirit which grew to a child in her womb. Consider the structure of the Tipi from the top: tips of the twelve poles forming a Tipi's skeleton spiral in a clockwise direction to the point where they all come together and cross before fanning out again to form the circular base where the lodge meets the earth. When a Tipi is being erected, a reddish ocher leather strap called the umbilical cord is wrapped around the poles at their crossing point and then is brought inside the circle and tied to two wooden stakes representing the father and mother criss-crossing similar to the letter X and staked to the ground.

24. The spiral of the poles crossing on top creates a belly button and the leather strap serves as the umbilical cord that is attached to the belly button. Because we are star people, we believe that when a man and woman ask for a child, the spirit of that child is caught by the Tipi on top in the fan of the Tipi and catches the spirit of the child falling from the Milky Way. The spirit of the child travels down through the umbilical cord to the mother and father inside the Tipi hence the woman conceives the spirit and becomes with child.

25. Because the leather strap that a woman used to tie the poles together and stakes down the Tipi was also the umbilical cord, the cord was tied in half hitches so as not to have a knot in the strap. If the strap was knotted, the woman would have a hard time giving birth to a child.

26. From this strap or umbilical cord also come both the straight lance, carried by the *Na ca'*, or society leaders and the curved staff carried by the *Itancan*, or Chief. Men carrying

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either staff commit their lives to protecting the woman and oral history/knowledge of the tipi thereby safeguarding the future of our generations to come. When a staff carrier lifted his staff which is the umbilical cord or straight lance, he showed honor to our creation story and to the women who bring life to this world. This action he would take to the society stone rings to pledge himself in life or death, to protect the oral knowledge, our spiritual culture, our women, children, grandchildren and the yet unborn generations to come, thus preserving the sustainability of our people.

III. CULTURAL SURVEY TECHNIQUES AND DATA

27. When Makoche Wowapi is hired to provide identification of "historic properties of religious and cultural significance," the width of the corridor or area of potential effect is very important. The larger the corridor the more manpower is needed and the timeline to complete the project is a concern for the applicant. The advantage to a big corridor is inventorying where stone features extend outside of the area of potential effect. These stone features sometimes have connecting features that extend well beyond 150 meters. We have been in areas where societies string their places of prayer along ridge lines up to one half mile, some societies have over one hundred members praying together at one location, that's what makes us so unique and the site itself.

28. Non-tribal archaeologists don't like a large site boundary because the applicant often feels that Tribe's identification process includes cultural landscapes, audio, visual, and water sources. But a large site boundary is important both to find all sites and to ensure that sites would not be adversely affected. Our main objective is to look at the areas, see what type of topography we have walked into and understand which spiritual walk of life these society men use. Some societies use the upper terraces, some use deflated or rolling hills, one walk of life requires using flat level topography and others go into a drainage or ravine system because of the

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setting, i.e., crescent moon, in the shape of the letter Y, etc.

29. This is where conventional archaeology fails the Tribes. Non-tribal archaeologists don't know the requirements of our spiritual people, for example, what type of environment and topography they require, unless they are members of our Tribes. Most archaeologists, similar to those who DAPL hired, are European descendants, are not from the Great Plains, and don't know our ways of conducting prayer at these types of location. The archaeologists are inconsistent in trying to evaluate stone feature sites, as they are not privy to this intellectual property as it is proprietary information to the Standing Rock Sioux Tribe and belongs to all of our bands of *Oceti Sakowin* that is connected to the *canupa* (pipe). For example, the DAPL archaeological report lists some stone rings as eligible for the National Register of Historic Places. Numerous other stone features are declared ineligible. I question this report. Within the recommendation contained in all DAPL archaeological reports each consulting firm give different recommendations on eligibility and are inconsistent with the other. One firm recommends stone ring(s) as eligible and others in the same report with a similar site type are not eligible. They don't know what to look for and they don't know how to evaluate these types of sites. I know for a fact the site types and stone features up in the Tioga area where DAPL is starting and the site types down east of the Missouri River around Linton, North Dakota are different. Only a trained eye and years of experience would assist an individual, if he was Lakota/Dakota. That's why the regulations for Section 106 allow for tribes to assist in evaluating these types of sites (36 CFR § 800.4(c)(1)). But there was no consultation with Tribal experts that I'm aware of that would enable them to make these determinations.

30. Our company does not conduct surveys similar to non-tribal archaeologists. Our methodology is different. What is very important is that we connect to the intangibleness of

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these sites when looking for what makes this site different from the one just a mile back. We have witnessed and experienced that most, if not at all sites, are still spiritually active. Another way to express this is you feel things that archaeologists don't. We always pray when we come upon a site or site complex. We always have one or two spiritual advisors with our survey crew to assist the surveyor and we leave offerings with the appropriate song and prayer.

31. It is common in my experience that non-Tribal archaeologists either misidentify important cultural sites, for example by declaring them as ineligible for National Register status when they are in fact eligible, or they miss them altogether. Given what I know about the proposed pipeline route, and my experience in this area, I can say with near certainty that there would be additional eligible sites in the pipeline right of way that have not been discovered yet—either misidentified as ineligible, or missed completely. These sites would be damaged or destroyed by pipeline construction. That is why the Section 106 consultation requirement is so important.

IV. FINDINGS IN THE DAKOTA ACCESS PIPELINE ROUTE

32. In the spring of 2014, our company was conducting a tribal survey identifying "historic properties of religious and cultural significance" for another project for the Standing Rock Sioux Tribe, Sisseton-Wahpeton Dakota Nation, and other *Oceti Sakowin* Tribes. We were east of Watford City, North Dakota surveying a 300-foot corridor for a client. Along the way, we crossed the DAPL survey stakes and realized it was running concurrent and sometimes overlapping our corridor Right of Way. On that day, I observed the archaeology firm personnel hired by DAPL in front of our crew walking the DAPL corridor. We took a break and observed their methodology, the width of their transect, and what they were recording. At that time, they were 200 feet walking away from us.

33. The survey that we saw them conduct was in my view completely deficient for

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identifying culturally significant sites. We observed them walking shoulder to shoulder, not walking spaced transects as reported in their Class III report. They would go far in distance and stop, do a shovel probe, and continue walking. We observed them as they walked a mile or so before we continued our survey. Afterwards, we identified stone rings near their survey stakes and realized that the archaeologists just moments earlier had walked right over them, but did not record them. The DAPL center line was close in numerous places to our survey corridor and we observed many stone features in this vicinity.

34. The area where we crossed paths with DAPL archaeologists is east of Watford City, North Dakota. Our project corridor started in Beulah, North Dakota running 70 miles west to Highway 85, turning north up to Williston, North Dakota, going around the west side of Williston and proceeding east of Williston and ended in Tioga, North Dakota, a 298-mile transmission line. This transmission line had a 300 foot corridor for review. In the Tioga area, we recorded over 300+ stone feature sites in a 30-mile portion of our corridor area alone. We recorded over 2,400 stone feature sites within the 300 foot width of the entire 298 mile corridor transmission line. We observed DAPL survey markers near our corridor right-of-way east of Watford City, North Dakota. This area in the northwest corner of North Dakota is very dense with stone feature sites. In a previous survey we conducted for Federal Highways and North Dakota Department of Transportation, we recorded 8,011 stone feature sites on the Williston By-Pass project. The proposed route of the DAPL pipeline in North Dakota progresses around the city of Williston, North Dakota. Based on the map provided on their web site, the pipeline route is almost adjacent to the Williston By-Pass route we surveyed for Federal Highway where the 8,000+ stone feature sites are located.

35. I can say without a doubt, DAPL will destroy many stone features in the area

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around Williston alone. It's imperative that the current action of DAPL conducting construction at such locations should be stopped. This really harms me as a Lakota/Dakota person who protects these areas. My whole life was for one purpose, to protect and preserve these areas for the children and grandchildren and the ones yet unborn, that the prophesy be fulfilled that our seventh generation will walk back to these sites to save the Nation and our spiritual way of life.

36. The area around the confluence of the Missouri and Yellow Stone Rivers was previously visited for thousands of years by *Oceti Sakowin*. Many battle sites, gathering sites and many spiritual sites are located here. One site was tested and was 12,000+ years old. Through thousands of years of occupation, our men stood on every hill at one time or another to pray; "they were everywhere." The area east and southeast of Watford City is also dense with stone features and is within the DAPL corridor. Pipeline construction in that area will result in destruction of known sites. We also documented historic sites on the Fort Berthold Reservation where they enter and cross the Missouri River. The areas across or on the south side of Fort Berthold is also very dense with these stone feature sites.

37. Our crew has also surveyed areas east of the Standing Rock Reservation starting in central North Dakota or within the Red River valley. This area was mainly Dakota aboriginal homelands, in particular to the Upper Ihunktowanna Pa Baksa (Cuthead) and Lower Yanktonai Ihunktowan Dakota. These were our areas we maintained and where I had the privilege of stepping into numerous areas I knew from oral history where the spiritual places of our grandfathers are located. I have done seven surveys east of the Missouri River with a combined total of over 4,800 stone features were identified. Many if not most of these sites meet the eligibility criteria under the NHPA and, more importantly, carry very high cultural and religious significance to the Tribe. The DAPL is going right through these areas we have already

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inventoried. Numerous burials were encountered along with stone buffalo effigies, huge multiple stone ring complexes and landscapes specific to buffalo spirit callers, a special spiritual man within our spiritual walks of life. My grandfather and great grandfather fought in wars with the U.S. Calvary in this valley and other enemy tribes to defend these stone feature sites. The destruction of these sites would be very personally painful to me and is very harmful to the cultural survival of the Tribe. Once lost they can never be restored.

38. Members of Makoche Wowapi were hired by Upper Sioux Community to assist in surveying certain PCN locations in South Dakota and Iowa. Our crew members started in South Dakota at various PCN locations but access was an issue. No GIS shape files were provided to the crew, if you don't have these you are basically walking in the dark trying to find a needle in a haystack. This is very uncommon. We are held to an ethical standard in survey work that if you don't have a center line and/or boundaries of the "area of potential effect" provided to you for your GPS unit, you could be outside of the area of review for a federal agency and you are basically not allowed to start. Yet, the Army Corps of Engineers (the Corps) stated that Upper Sioux, when requesting this data for our GPS units, referenced proprietary information and sent out archaeologists to stake out the center line and the outside boundary of the corridor without adequate information. Our crew members were given a map and they had to guess where the corridor was located in relation to the land.

39. Where unbroken ground was located, DAPL denied access to the tribal survey team. DAPL provided unrestricted access to the archaeologists to survey Class III reports but the tribes were not given this access. This is the reason the Upper Sioux objected. Normally, on other federal undertakings, the lead federal agency impresses to the applicant that if access is denied to areas under review, the agency cannot determine adverse impact and will withhold

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their approval until either access is secured by the applicant so surveying can occur or a Programmatic Agreement is developed and signed off by interested parties and the Advisory Council on Historic Preservation concurs. In this case sufficient access to PCN locations was denied both by DAPL and the Corps but the permits were granted anyway.

40. During discussions with the Army Corps, the Tribe raised its concerns that we knew that the pipeline would go through known sacred and historic sites because of the extensive surveys we conducted with other Federal undertakings. Those warnings were ignored. Now, construction has already started in many of these sites. Due to my familiarity with the area and the survey route, it is my opinion that it is highly likely that construction has already impacted and destroyed culturally important sites. These are sites that are eligible for listing under the National Register, and sites that hold deep cultural meaning for me and other Tribal people. Not only is the adverse impact occurring in the proposed corridor, but the connecting roads, staging areas, and heavy equipment movement outside of the corridor right-of-way have never been surveyed either. The destruction of sites of religious and cultural significance to the Standing Rock Sioux Tribes and other *Oceti Sakowin* Tribes in the Great Plains will continue if construction does not stop.

V. THE TRIBE AND TRIBAL MEMBERS WILL BE IRREPARABLY HARMED BY PIPELINE CONSTRUCTION

41. The Tribe and the members of the Standing Rock have direct ties to the stone features. Many have sacred medicine bundles that are tied to these stone feature sites. When these sites are adversely impacted, it destroys the spiritual connection to these individuals. We shall see the continued destruction of our spiritual places if the court doesn't intervene. This destruction greatly harms the Tribe generally, and members of the Tribe like myself.

I declare under penalty of perjury that the foregoing is true and correct to the best of my

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knowledge.

Executed on August 11, 2016, at Fort Yates, North Dakota.

Tim Mentz, Sr.

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ATTACHMENT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

SUPPLEMENTAL DECLARATION OF TIM MENTZ, SR. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Tim Mentz, Sr., declare as follows:

1. I have previously submitted a declaration to this Court that includes my qualifications and background. In that declaration, I expressed an opinion that the construction of the pipeline would very likely, if not certainly, destroy sites of significant cultural and historic value to the Standing Rock and other tribes. This declaration provides additional information to support that opinion.

2. On August 28, 2016, I received an unsolicited phone call from Mr. Dave Meyer, the individual who owns the land immediately to the north of the Standing Rock reservation on either side of Route 1806, which is the area on the west side of Lake Oahe and has been a focus of the dispute between the Tribe and DAPL. Mr. Meyer owns 8,000 acres, and uses it primarily to graze buffalo. Mr. Meyer wanted to discuss a cultural survey of his land by my company.

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Mr. Meyer stated that he was concerned about the potential destruction of culturally important sites and hoped to facilitate efforts to mitigate or avoid harm to important sites from the pipeline, and maintain a record of them for his family. Mr. Meyer stated that he didn't know what a cultural site or burial looked like, and wanted to know where these sites are located so he could understand how he should manage his land.

3. Mr. Meyer told me that he controlled the land outside the pipeline corridor and could give permission to anyone he wanted to enter his land. He did grant that permission to me and my co-workers as long as we did not enter into the corridor itself. He directed us to an area of his property on the west side of Highway 1806 through which the pipeline corridor traversed that was not being grazed by buffalo at the time, and invited us to survey it. The area is approximately 1.75 miles away from the proposed Lake Oahe crossing. No construction equipment was in sight. He stated that we could enter the pipeline corridor itself as long as he accompanied us, and indicated that he wanted to do that in the near future once we'd familiarized ourselves with the area.

4. At 2:30pm on that day, I followed Mr. Meyer's instructions to an area adjacent to the pipeline corridor to the west of Highway 1806. The pipeline right-of-way was clearly visible as it was staked out and had been mowed and cleared of large vegetation. The day was clear and visibility was very high along the route. We immediately observed a number of stone features in the pipeline route plainly visible from the edge of the corridor. I am very confident that this site, located within the center of the corridor, includes burials because the site contained rock cairns which are commonly used to mark burials. Two cairns were plainly visible and a possible third one existed above the cut area. I then noticed to the east twenty meters of this area a prairie dog town and multiple stone rings visible at that distance. Since prairie dogs eat all vegetation to the

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soil, these stone features were very visible and very distinct. (I discussed the importance of these kinds of features in my first declaration.) The stone rings were also directly in the cleared pipeline corridor.

5. Because we found significant stone features in just a short amount of time during a casual reconnaissance, we concluded this visit so that we could return with a survey team to conduct a full Class III cultural survey of the site. My initial impression was that we had seen sites of significant cultural importance and that the site needed greater scrutiny. The landowner had told me during the August 28 phone call that he would allow us to survey the pipeline corridor itself, which was permitted as long as he was with us. I felt that surveying the pipeline corridor (rather than standing outside of it and looking in) would be useful to further classify and evaluate the sites that we could see from the corridor's edge. However, when we talked subsequently, Mr. Meyer changed his mind and would not accompany us into the corridor. As a result, we continued the Class III survey work on the edge of the pipeline corridor, looking into it but not entering the corridor itself.

6. On August 30 and 31, and September 1, 2016, we completed a Class III survey along the south side of the DAPL corridor over a length of approximately two miles and a width of 150 feet. In this area, we found a significant number of stone features (82) and archeological sites, including at least 27 burials. Some of these sites are immediately adjacent the DAPL corridor. Many others visibly extended from outside the corridor (where we had direct access) to inside the corridor (where we did not). Because the rock was so visible inside the corridor, we were able to get useful drawings of many sites that extended into the corridor. Other maps depict numerous sites adjacent to, and in, the pipeline corridor. Note that a site can refer to either a single stone feature such as a rock cairn or ring, or a complex of multiple features covering a

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much greater area.

7. In addition to a large number of cairns, burials, and stone rings, the survey found five sites of very great cultural and historic significance. These stone feature sites are very rare to find and are located within the corridor or adjacent to the corridor by as little as a foot. Based on my extensive experience evaluating sites on the National Register of Historic Places, it is my opinion that each of these sites unquestionably meets the criteria for inclusion in the National Register. The Hunkpapa and Cuthead Bands are specific to the Standing Rock Sioux Tribe and its members still reside in the area and remember these stone feature site locations. This area contains site types of different leadership that is highly concentrated in one area, which makes this cultural landscape very unique and limited in data recordation. These types of areas are very unusual and hard to find in the type of density that we observed here.

8. I have included with this declaration the following Exhibits. Exhibit 1 is a map that my company created, under my oversight. of the pipeline corridor west of HWY 1806 that marks the sites we have found inside and outside of DAPL corridor. Exhibit 2 is a copy of a map of the land under Dave Meyer's ownership that he gave to me on August 29, 2016. Exhibit 3 includes the tables referencing a Feature ID, diameter in meters, stone count, grave, sodden rock, generational (if used by more than one person), and UTM locational data, and hand drawings depicting the layout of the stone features relative to the pipeline corridor from our survey work on August 30. Exhibit 4 includes the same material from the day of August 31. This is material that is typically provided as part of any competent archaeological survey, and was prepared by my company under my supervision.

9. I will briefly describe some of the very unique site types below but before I do, I want to explain that the fact that some of these sites are not immediately in the pipeline corridor

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does not mean that they are safe from damage or destruction. I have observed pipeline construction many times. Construction impacts are rarely if ever limited to the 150 foot construction corridor. There is major heavy equipment travelling outside the construction corridor and other activities like stringing and welding of pipe. That is why cultural surveys on pipeline routes are always 400 feet. Fencing or other measures can help protect sites from this kind of damage but we did not see any fencing around any of these sites.

10. *Iyokaptan Tanka* (Big Dipper): This stone feature, which is a physical depiction of a constellation across a large area, is very rare to find within the Great Plains and within Oceti Sakowin homelands. This is only the third time I have seen one identified and recorded during my lifetime. I know how much importance the Elders and spiritual advisors place on this star constellation, this constellation was a measuring stick for leadership, who fasted or vision quested in the "cup" of the Big Dipper to make the ultimate commitment to the people. This is the last level to attain as a Chief and very few Chiefs made it to the seventh level in leadership, as I have been told. Only a Chief or *Itancha* can stand in the cup of the Dipper. But to find a grave attached to the cup signifies the importance of this leader and this site. This means that there is a very important leader buried here, what the Elders would say of him as "he was beyond reproach." **This is one of the most significant archeological finds in North Dakota in many years.** When we were pushed onto reservations we brought this knowledge with us but had to leave these special places behind. This site can be identified as F11 through F13 (many important sites contain multiple features, which are numbered separately) on the hand map in Exhibit 3. It is approximately 75 feet from the edge of the pipeline corridor.

11. *Chante Tinza Wapaha* (Strong Heart Society Staff): This site extends into the DAPL pipeline corridor. This site is a clear indicator of the Hunkpapa Strong Heart Society.

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The Strong Heart rattle or coup stick is in the center of the site hooking the stone ring and the half ring together. The other features are evidence that others had followed a similar spiritual path and completed their spiritual walk of life. This indicates that a pledge was made between two Strong Heart members sharing their vision quest that had a similar purpose to be sealed with prayer when using the coup stick in battle. This site also contains one grave. The Strong Heart Society was an elite warrior society where only the best and bravest warriors were members coming from the Hunkpapa band and this is where one would make that step to be a society member. These sites are spread out in our homelands but very few of these sites have been identified and recorded by Tribes. This is a very significant and important site and today because the landowner offered to provide access for our people of Standing Rock to use these sites, we have a place close to home that can fulfill this void we can use. This is true of all of the sites here but this one is unique to Hunkpapa band people and hence even more important. This site can be identified as F1 through F6 on the map in Exhibit 3. Portions of this site are directly in the pipeline corridor and would be destroyed by pipeline construction.

12. *Mato Wapiya* (Bear Medicine Healer): This is a stone effigy of a bear along this ridge line a few feet from the DAPL corridor. This bear effigy was connected to the Strong Heart society members. To find evidence of where the Bear Medicine man's presence or fasting area connected to a society is very unusual, but we know they are out there, as evidenced here. We only have great stories of these types of men; the deeds they accomplish during times when healing needed to occur. The gift of this type of healer was profound to the extent that other bands shared these medicine men, but to find his site where he received his gift of healing is very extraordinary. We have only found one other location of this type of site in the Great Plains in my 35 years of cultural resource study. This site is immediately adjacent to the DAPL corridor

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line and adverse impacts to this site are likely. It can be identified as site KM5F in Exhibit 4.

13. *Itancha* (Chiefs Dreaming Pair with Staffs): This is another important and unusual stone feature that falls outside the pipeline corridor by as little as one foot. The leadership of a Chief was determined by his people. He displayed the seven sacred virtues required to fulfill a position within the leadership ranking of the society. This site is very important as this type of site brings Chiefs and society leaders together, to fast together for unifying their bands or bringing a consolidation of people for protection and making of relatives. There would be no unity if the leaders didn't get along but this site belongs to two bands within Oceti Sakowin, and there is oral history to this site still remembered by members of the Standing Rock Sioux Tribe. This site can be identified at as sites TM4F through TM10F in Exhibit 4.

14. Grave and Stone Arc: This site is within the DAPL corridor with the Arc and burial, meaning they will be destroyed if construction proceeds. The Arc represents the handle of the Iyokaptan Tanka or Big Dipper. Only a Naca' or society leader can stand in the handle of the dipper and he carries a straight lance. As reported above the Big Dipper is near these two stone features and is connected. This is a very important site to the Standing Rock Sioux Tribe. It can be identified as sites TM16F through TM 18F in Exhibit 5.

15. Each of these sites carries great historic, religious, and cultural importance to the people of Standing Rock, other tribes of the Oceti Sakowin, and me personally. Unless DAPL is stopped from clearing and grading the corridor, all of these features, and all of the graves and other significant stone features of our spiritual ways, that are in the corridor will be damaged or destroyed. They are irreplaceable to our Lakota/Dakota people.

16. The area that I surveyed was extremely dense in stone features, which is quite unusual. There are 27 graves or cairns that we located, 16 stone rings, and 19 effigies, among

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other features. This concentration of stone features is very unusual and reveals that this was a culturally very important place for the Tribe's ancestors.

17. I have previously reviewed the Class II/III archaeological survey prepared by DAPL's consultants for this area. To the best of my knowledge, none of the sites identified herein were found in that survey. This is consistent with my experience elsewhere, in which we have found important cultural sites in areas that were previously surveyed by DAPL's consultants but not found by them at PCN locations in South Dakota and Iowa. To me this highlights the importance of tribal consultation. As with the other sites we have found, the DAPL consultants would have had to literally walk directly over some of these features. However, reviewing DAPL's survey work, it appears that they did not independently survey this area but relied on a 1985 survey.

18. I have previously testified about the cultural and historic importance of the area around the Cannon Ball River drainage near the Missouri River. The area around the mouth of the Cannon Ball River was very important because prior to the establishment of the reservation in 1873, it was a gathering area for numerous tribes. Numerous sacred sites were located there and were known by the tribes as a very holy place or "*wakan*" and no warfare or spilling of blood occurred there. Warring bands or enemies never created conflict with each other as a spiritual presence was there and all who came knew and felt it. All came to pray at this site having no fear of war or bloodshed. It is not at all surprising to me that there are many important cultural sites in this area, which is why the Tribe has worked so hard to seek to protect it.

19. In the early 1960's, the Corps of Engineers flooded the lowlands along the Missouri River in this area for the Oahe dam and reservoir project. Prior to the flooding, as a young boy I would ride or walk alongside a horse-drawn wagon owned by my uncle, who took

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my grandmother to Fort Rice which was located approximately 13 miles north of the mouth of the Cannon Ball along the Missouri River. A grocery store was located there and most people traveled there as it had a train depot station there. We would stop and our grandmother, who was born in 1891, had us go to the nearby hills to the west not far from the old wagon trail and take food to the spirits of our relatives. These hills are near the HDD entry where DAPL plans on inserting the pipeline to go east under the Missouri River. Numerous burials of an old warrior society and chiefs are buried there up on top and near the bottom of the hills and it was custom to stop and feed their spirits with *wasna* (a pounded beef jerky mixed with tallow) and also give water to the spirits. This is where the Dakota Access pipeline is proposed to go. It grieves me today to remember how respectful we were then, and how we as young adults were required not to talk or make any loud noise in respect to the society leaders buried there when offering them food, when now this area will be destroyed. Since childhood I have been aware of many buried in this area stretching north and northwest of one of DAPL's proposed access roads including the west side of Highway 1806 and including the area up past the proposed pipeline corridor.

20. The mouth of the Cannon Ball River also has a significant role in establishing the relationship between the federal government and the Oceti Sakonwin. The area is where tribal leaders and members gathered to discuss the proposed Treaty of 1851, a very important Treaty. This is where they took council and was said to have had tens of thousands of Lakota and Dakota relatives. Land areas within the 1851 Treaty area are still important to the Oceti Sakonwin.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on September 2, 2016, at Fort Yates, North Dakota.

Tim Mentz, Sr.

Earthjustice
705 Second Ave., Suite 203

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, I electronically filed the foregoing *Second Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
Jan E. Hasselman

Earthjustice
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Seattle, WA 98104
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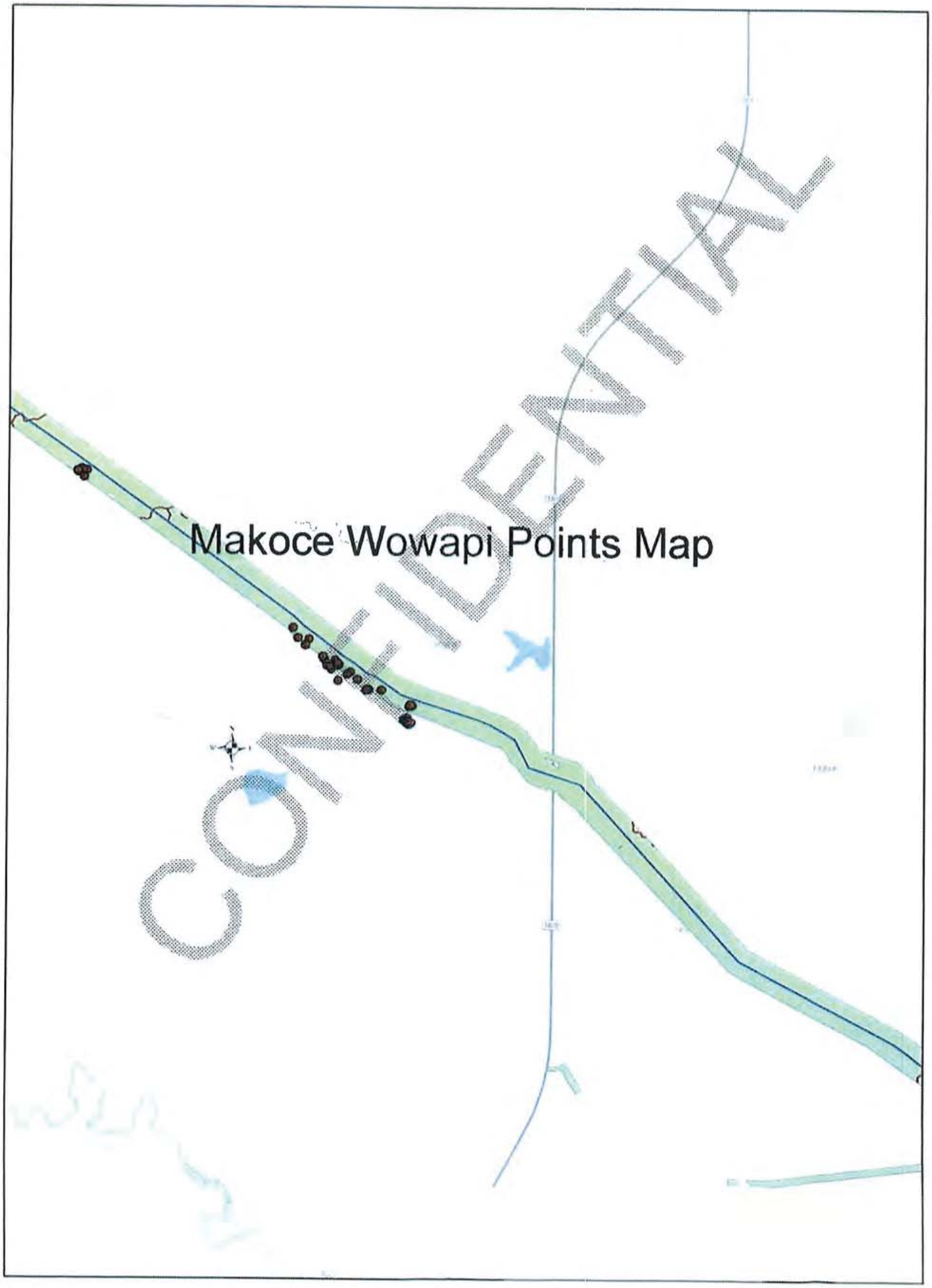
EXHIBIT 1


Makoce Wowapi Points Map

CONFIDENTIAL

EXHIBIT 2

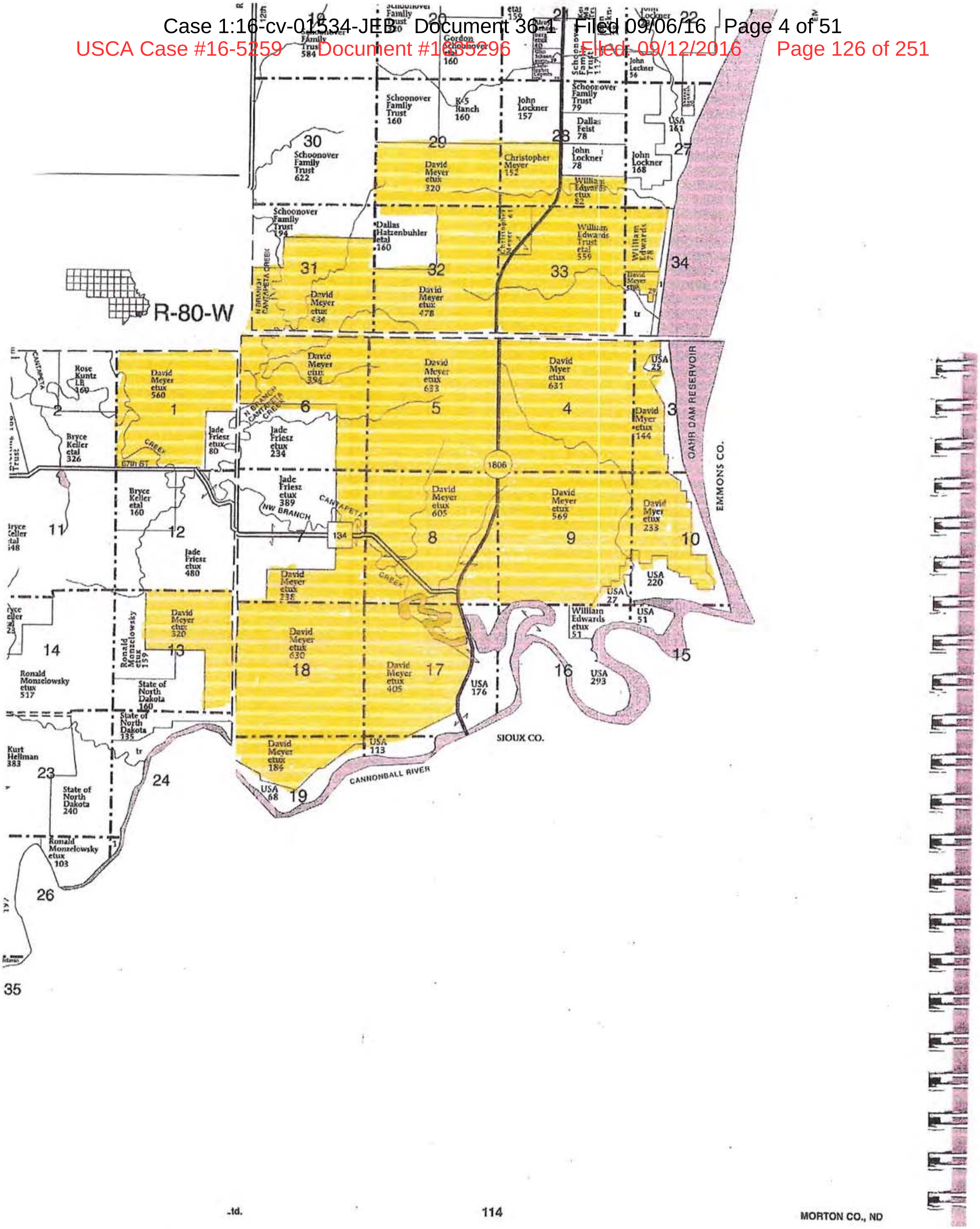

R-80-W
Schoonover Family Trust 622
David Meyer etux 320
Christopher Meyer 152
John Lockner 78
John Lockner 168
William Edwards etux 52
Schoonover Family Trust 194
Dallas Hatzenbuhler etal 160
William Edwards Trust etal 559
William Edwards 78
David Meyer etux 434
David Meyer etux 478
David Meyer etux 394
David Meyer etux 633
David Myer etux 631
Rose Kuntz LE 160
David Meyer etux 560
Bryce Keller etal 326
Jade Friesz etux 80
Jade Friesz etux 234
David Myer etux 144
Jade Friesz etux 389
David Meyer etux 605
David Meyer etux 569
David Myer etux 233
Bryce Keller etal 160
Jade Friesz etux 480
David Meyer etux 238
David Meyer etux 320
David Meyer etux 630
David Meyer etux 405
William Edwards etux 51
Ronald Monzelowsky etux 517
Ronald Monzelowsky etux 159
State of North Dakota 160
State of North Dakota 135
David Meyer etux 186
Kurt Hellman 383
State of North Dakota 240
Ronald Monzelowsky etux 103
OAHR DAM RESERVOIR
EMMONS CO.
SIOUX CO.
CANNONBALL RIVER
CANTAPETA CREEK
NW BRANCH
67th ST
1806
134

EXHIBIT 3

Project Name Makoche Wowapi

Photo Log

FEATURE ID	PICTURE #	DIRECTION FACING	DESCRIPTION
KM2F083116	73	E	DIAMOND CAIRN (GRAVE)
TM1F083116	74	E	TRI-ANGLE CAIRN (GRAVE)
TM2F083116	76	E	CAIRN (GRAVE)
KM3F083116	77	E	CAIRN (GRAVE)
TM3F083116	78	E	WHISTLE CAIRN (GRAVE)
TM5F083116	79	E	CAIRN IN HOOKED STAFF (GRAVE)
TM6F083116	80	E	CAIRN IN HOOKED STAFF (GRAVE)
TM7F083116	81	E	1m RING IN HOOKED STAFF (GRAVE)
TM11F083116	82	E	1m CAIRN IN BIG DIPPER EFFIGY
TM14F083116	83	E	RING WITH GRAVE
TM15F083116	84	E	CAIRN (GRAVE)
TM16F083116	85	E	CAIRN (GRAVE) IN LIGHTING BOLT EFFIGY
TM17F083116	86	E	CAIRN (GRAVE) IN LIGHTING BOLT EFFIGY
TM1F090116	87	E	CAIRN (GRAVE)
KM12F083116	88	E	VEIW OF CAIRN (Grave) BY R.O.W LOOKING EAST
KM12F083116	89	E	CAIRN (GRAVE)
KM12F083116	90	E	VIEW OF FEATURE IN R.O.W (D.A.P.L)
			2m NORTH OF KM12F083116

Makoche Wowapi

PROJECT NAME: Meyer Property **DATE:** 08/30/2016 **PAGE:** 1 of 2

NOTES:

FEATURE ID	N/S	E/W	STONE COUNT	GRAVE	SODDED	GENERATIONAL	X=	Y=	ARCHTYPE	DESCRIPTION
TM1F083016	6.5	6.5	40+	yes	yes	yes	100 38 20.53	46 27 14.98	Ring with alignment with cairn	Ring with grave with Arc
TM2F083016	5	3.5	23	No	yes	yes	100 38 20.28	46 27 15.05	Effigy	1/2 Moon effigy
TM3F083016	4	4	21	No	yes	yes	100 38 20.41	46 27 15.21	Effigy	1/2 Moon effigy
TM4F083016	8	7	23	No	yes	yes	100 38 20.07	46 27 15.21	Ring	Ring
TM5F083016	3	4	10	NO	Yes	Yes	100 38 19.96	46 27 15.08	Effigy	1/2 Moon Effigy
TM6F083016	4	3	10	NO	Yes	yes	100 38 20.23	46 27 15.20	Effigy	Coup Stick Effigy
LA1F083016	3	5	7	No	yes	Yes	100 38 20.97	46 27 13.49	Alignment	Letter V shaped alignment
LA2F083016	13	18	17	yes	yes	yes	100 38 21.23	46 27 13.17	Alignment w/ 2 Depressions & cairn	Arc w/ 2 Deppression & grave cairn
LA3F083016	5	5	6	No	yes	Yes	100 38 21.62	46 27 13.19	Alignment	Arc
LA4F083016	9	4	24	NO	yes	yes	100 38 21.49	46 27 13.19	Multiple Stone Features	Double Arc w/ alignment
LA5F083016	6	5	17	NO	yes	yes	100 38 21.19	46 27 12.96	Multiple Stone Features	2 connected Rings w/ Arc
LA6F083016	3	3	5	No	Yes	Yes	100 38 21.16	46 27 13.02	Ring	Ring

Makoche Wowapi

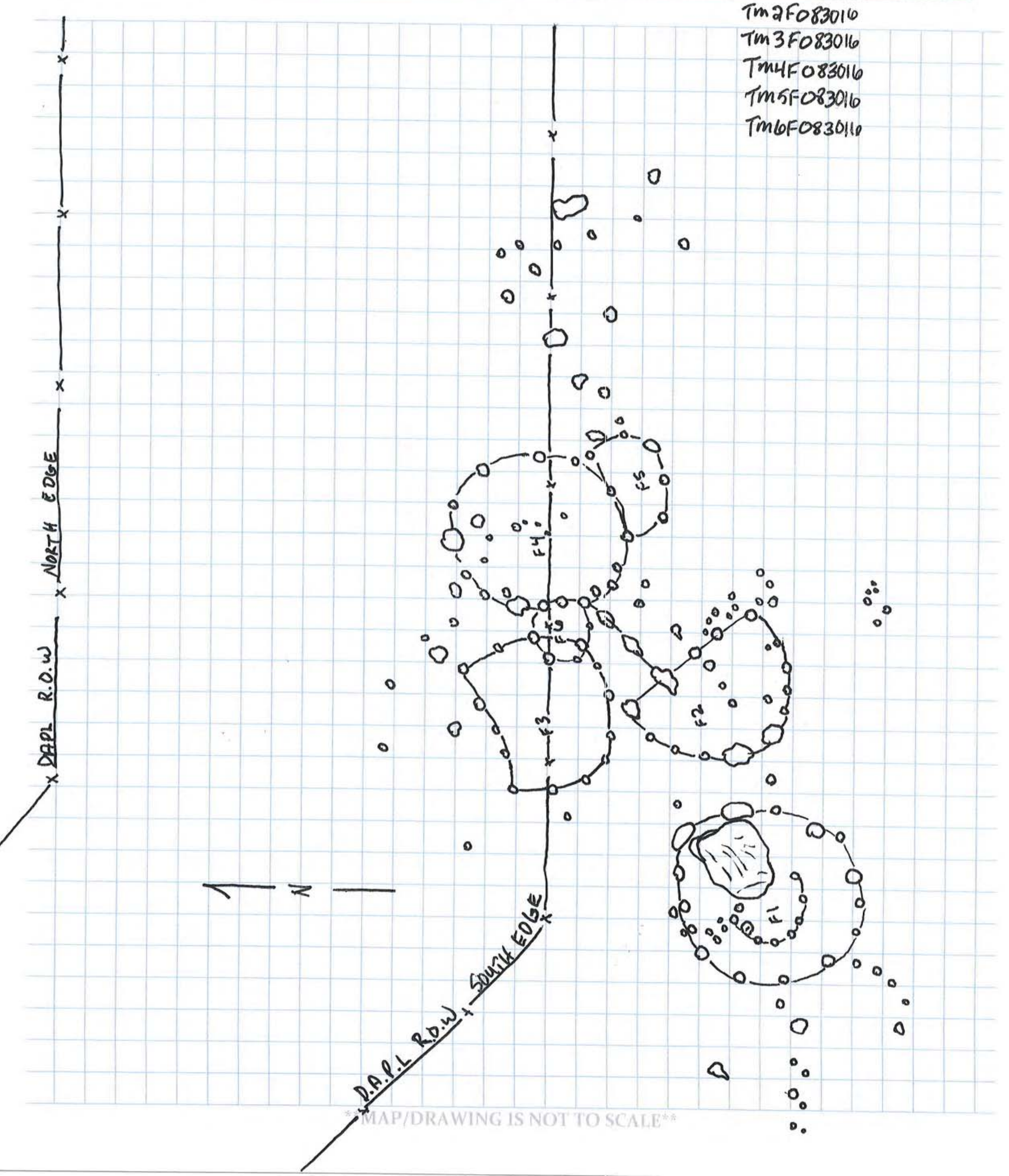
PROJECT NAME: Meyer Property **DATE:** 08/30/2016 **PAGE:** 2 of 2

NOTES:

FEATURE ID	N/S	E/W	STONE COUNT	GRAVE	SODDED	GENERATIONAL	X=	Y=	ARCHTYPE	DESCRIPTION
LA7F083016	3	3	7	No	Yes	Yes	100 38 20.97	46 27 12.99	Ring	Ring
LA8F083016	10	10	13	No	Yes	Yes	100 38 20.75	46 27 12.97	Ring	Ring
LA9F083016	2.5	3	16	Yes	Yes	Yes	100 38 21.06	46 27 12.76	Multiple Stone Features	Arc w/ring w/ center grave
LA10F083016	3	4	14	No	Yes	Yes	100 38 20.82	46 27 12.67	Ring within a Ring	Ring within a Ring
LA11F083016	6	6	14	No	Yes	Yes	100 38 20.62	46 27 12.67	Ring with Alignment	Ring with Arc
LA12F083016	5	4	6	No	Yes	Yes	100 38 20.62	46 27 12.60	Arc	Arc
LA13F083016	3	2.5	5	No	Yes	Yes	100 38 20.32	46 27 12.71	Ring	Ring
LA14F083016	8	6	14	No	Yes	Yes	100 38 20.21	46 27 12.78	Ring within Ring	Ring within Ring

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-30-16 Feature ID: TM1F083016 Photo #
TM2F083016
TM3F083016
TM4F083016
TM5F083016
TM6F083016


NORTH EDGE
DAPL R.O.W
F1
F2
F3
F4
F5
F6
N
SOUTH EDGE
D.A.P.L R.O.W

MAP/DRAWING IS NOT TO SCALE

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-30-16 Feature ID: LA1F 083016 Photo #: N/A

LA2F 083016
LA3F 083016
LA4F 083016
LA5F 083016
LA6F 083016
LA7F 083016
LA8F 083016
LA9F 083016
LA10F 083016
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LA13F 083016
LA14F 083016

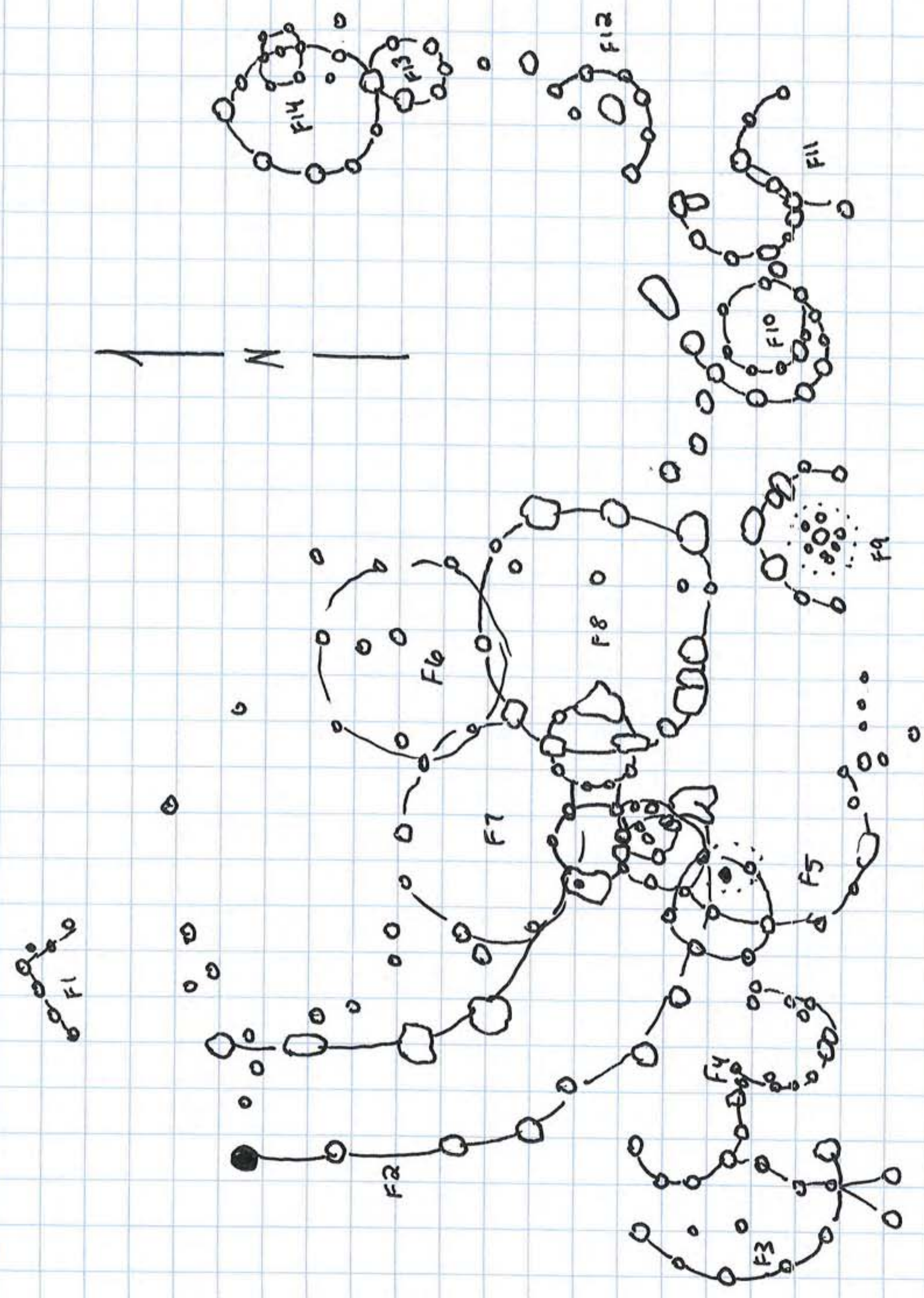

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EXHIBIT 4

Makoche Wowapi

PROJECT NAME: Meyer Property **DATE:** 08/31/2016 **PAGE:** 1of 3

NOTES:

FEATURE ID	N/S	E/W	STONE COUNT	GRAVE	SODDED	GENERATIONAL	X=	Y=	ARCHTYPE	DESCRIPTION
KM1F083116	4	5	1	yes	yes	No	100 38 26.10	46 27 17.20	Depression with Cairn	Grave within a depression
KM2F083116	4	4	14	yes	yes	yes	100 38 28.64	46 27 17.27	Cairn	Grave Cairn
TM1F083116	1	1	15	yes	yes	yes	100 38 29.02	46 27 17.34	Effigy Cairn	Triangle grave Cairn
TM2F083116	1	1	6	yes	yes	yes	100 38 29.17	46 27 17.21	Cairn	Grave Cairn
LA1F083116	3	3	8	No	yes	No	100 38 30.88	46 27 18.66	Arc	Arc
KM3F083116	5	5	19	yes	yes	yes	100 38 32.24	46 27 19.72	Cairn	Grave Cairn
LA2F083116	1	1	4	yes	yes	NO	100 38 32.97	46 27 19.41	Cairn	Grave Cairn
TM3F083116	1.5	1.5	7	yes	yes	yes	100 38 34.78	46 27 18.48	Effigy with Cairn	whistle effigy with Grave cairn
KM4F083116	14	14	32	yes	yes	yes	100 38 34.53	46 27 20.71	Alignment with Cairn	Alignment with Grave Cairn
KM5F083116	10	9	60	NO	yes	yes	100 38 35.35	46 27 21.30	Effigy with Alignment	Bear Effigy with alignment
LA3F083116	5	9	15	yes	yes	yes	100 38 36.18	46 27 20.10	Effigy with Depression	Crescent Moon with center depression
TM4F083116	14	7	30	yes	yes	yes	100 38 35.11	46 27 20.59	Effigy with Cairn	Hook Staff with Grave Cairn

Makoche Wowapi

PROJECT NAME: Meyer Property **DATE:** 08/31/2016 **PAGE:** 2 of 3

NOTES:

FEATURE ID	N/S	E/W	STONE COUNT	GRAVE	SODDED	GENERATIONAL	X=	Y=	ARCHTYPE	DESCRIPTION
TM5F083116	1	1	5	yes	yes	yes	100 38 35.20	46 27 20.68	Cairn	Grave Cairn
TM6F083116	1	1	6	yes	yes	yes	100 38 35.27	46 27 20.78	Cairn	Grave cairn
TM7F083116	1	1	8	NO	yes	yes	100 38 35.20	46 27 20.89	Ring	Ring
TM8F083116	6	10	25+	yes	yes	yes	100 38 35.04	46 27 20.85	Effigy with Cairn	Hook Staff with Grave Cairn
TM9F083116	2.5	2.5	8	No	yes	yes	100 38 34.96	46 27 20.98	Effigy	Triangle Effigy connected to TM8F083116
TM10F083116	2.5	3	8	NO	yes	yes	100 38 34.87	46 27 20.96	Alignment	Box alignment connected to TM8F083116
KM6F083116	2.5	2	7	yes	yes	yes	100 38 37.05	46 27 20.63	Alignment	Letter V alignment grave
LA4F083116	4	5	8	No	yes	yes	100 38 36.48	46 27 20.48	Arc	Arc
LA5F083116	5	5	19	No	yes	yes	100 38 37.44	46 27 21.42	Effigy	Crescent Moon Effigy
LA6F083116	1	1	3	yes	yes	yes	100 38 37.86	46 27 21.82	Cairn	Grave Cairn
KM9F083116	1	1	4	yes	yes	yes	100 38 40.68	46 27 24.19	Cairn	Grave Cairn
TM11F083116	1	1	4	yes	yes	yes	100 38 41.35	46 27 23.40	Cairn	Grave cairn

Makoche Wowapi

PROJECT NAME: Meyer Property

DATE: 08/31/2016

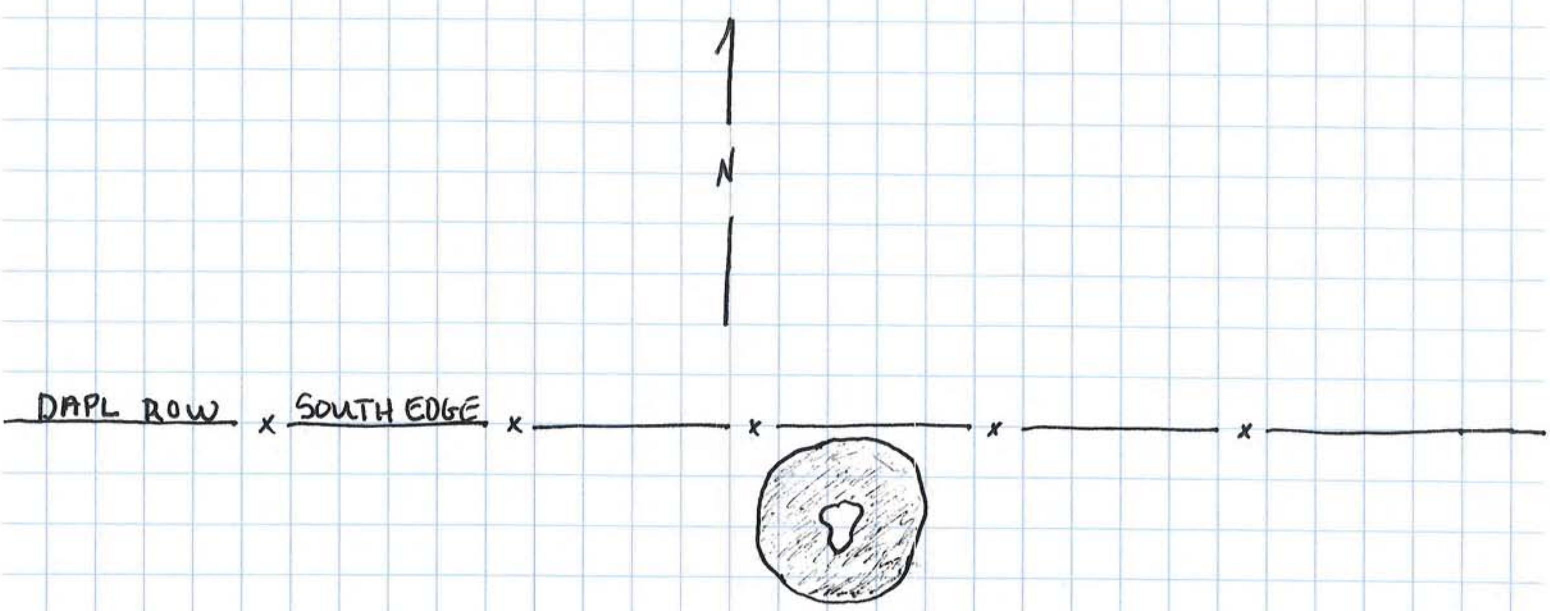
PAGE: 3 of 3

NOTES:

FEATURE ID	N/S	E/W	STONE COUNT	GRAVE	SODDED	GENERATIONAL	X=	Y=	ARCHTYPE	DESCRIPTION
TM12F083116	2	4	14	NO	yes	yes	100 38 41.45	46 27 23.38	Effigy	1/2 Moon Effigy
TM13F083116	12	15	36	NO	yes	yes	100 38 41.37	46 27 23.37	Effigy	Big Dipper Effigy
KM10F083116	7	6	31	yes	yes	yes	100 38 42.93	46 27 24.36	Cairn	Grave Cairn
TM14F083116	4	4	13	yes	yes	yes	100 38 43.93	46 27 25.76	Ring	Ring
TM15F083116	2	2	18	yes	yes	yes	100 38 43.89	46 27 25.77	Cairn	Grave Cairn
KM12F083116	1	1	4	yes	yes	yes	100 39 25.25	46 27 47.25	Effigy Cairn	Grave Cairn Effigy connected to TM18F083116
TM16F083116	1	1	5	yes	yes	yes	100 39 25.83	46 27 46.35	Cairn with alignment	Grave Cairn with alignment
TM17F083116	1	1	5	yes	yes	yes	100 39 26.25	46 27 47.48	Effigy Cairn	Triangle Effigy Grave Cairn
TM18F083116	3	20	29	yes	yes	yes	100 39 26.09	46 27 47.34	Effigy with 2 Cairns	Lightning Bolt Effigy with 2 Grave Cairns
LA7F083116	16	15	36	NO	yes	yes	100 39 26.93	46 27 47.07	Effigy	Crescent Moon Effigy
LA8F083116	1	1	2	yes	yes	yes	100 39 27.09	46 27 47.19	Cairn	Grave Cairn within LA7F083116

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KM1F083116 Photo #N/A



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Makoche Wowapi

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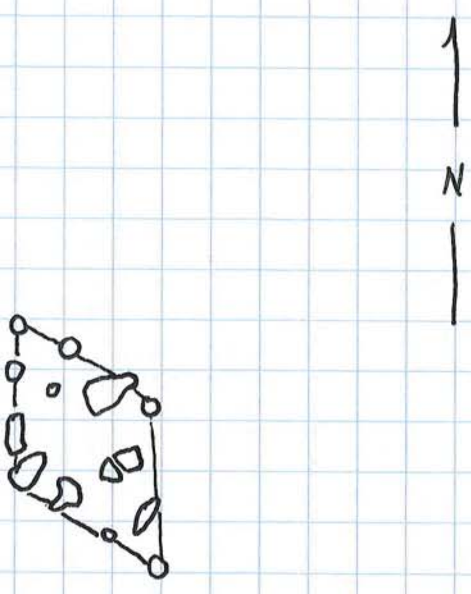

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KM2F083116 PHOTO #73

Makoche Wowapi

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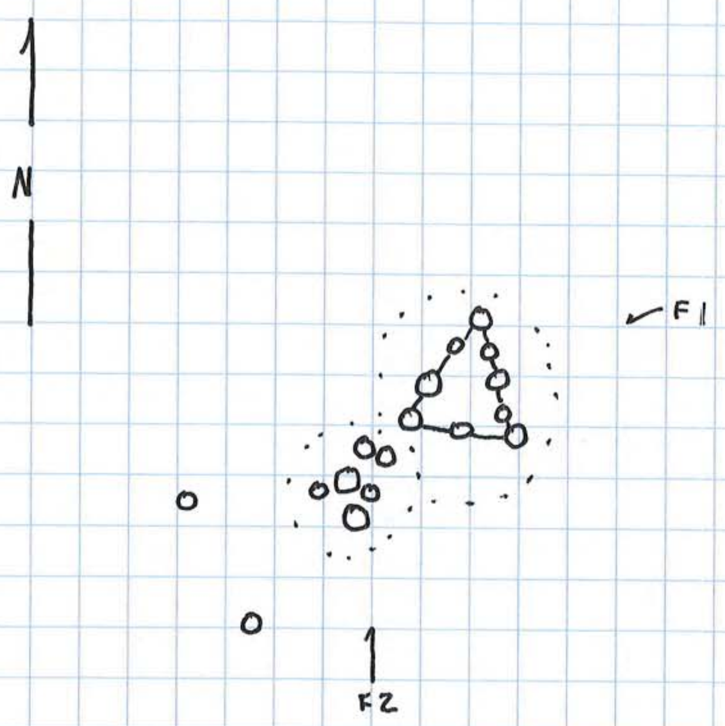
TM2F083116 - 76



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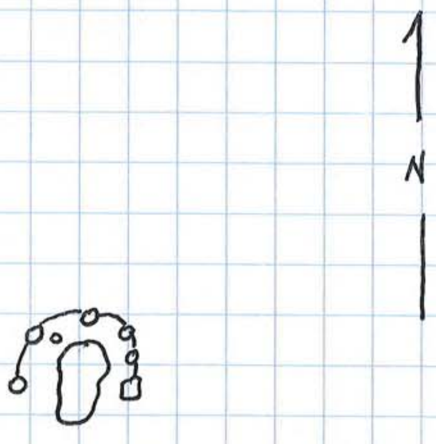
TMIF083116 PHOTO # 74

TM 2F 083116

PHOTO # 76

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: LAIF083116 Photo #N/A



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Makoche Wowapi

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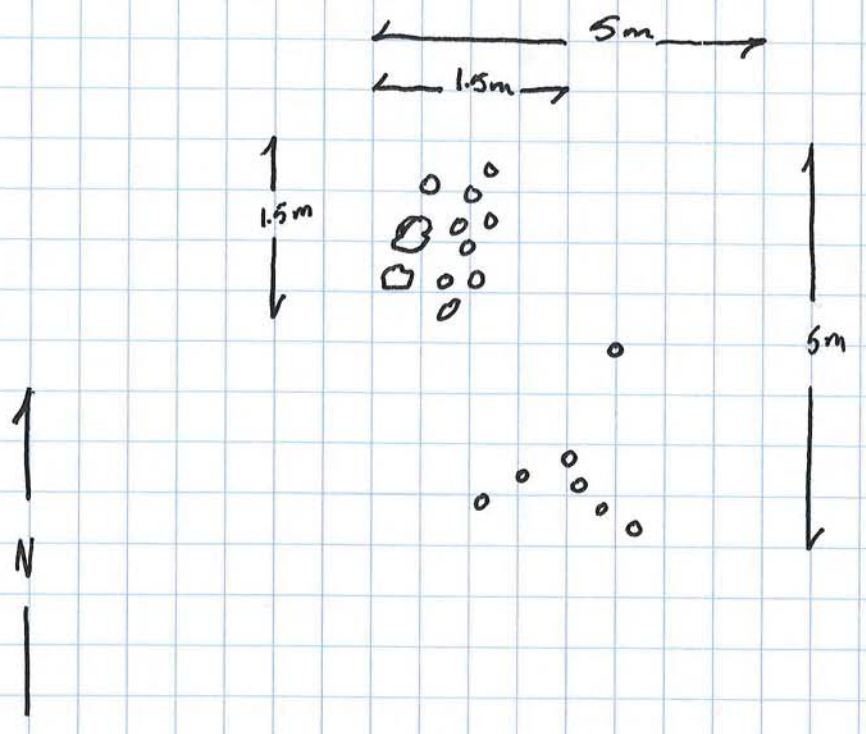

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KM3F083116

PHOTO # 77

Makoche Wowapi

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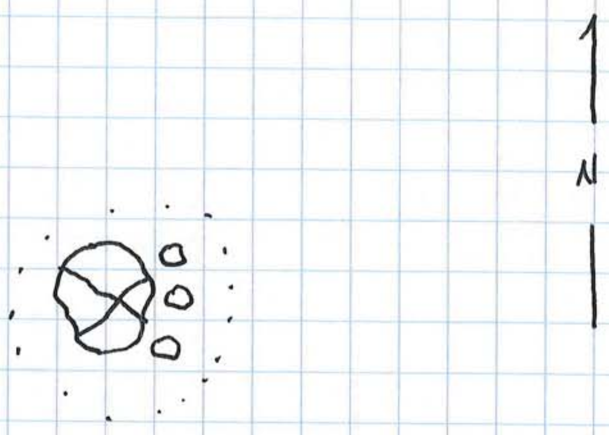

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Makoche Wowapi

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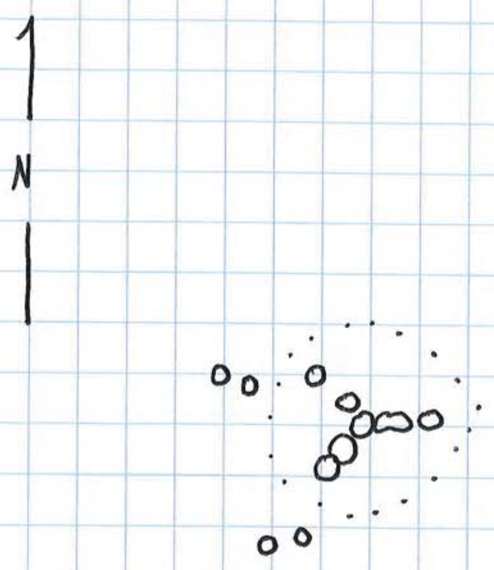

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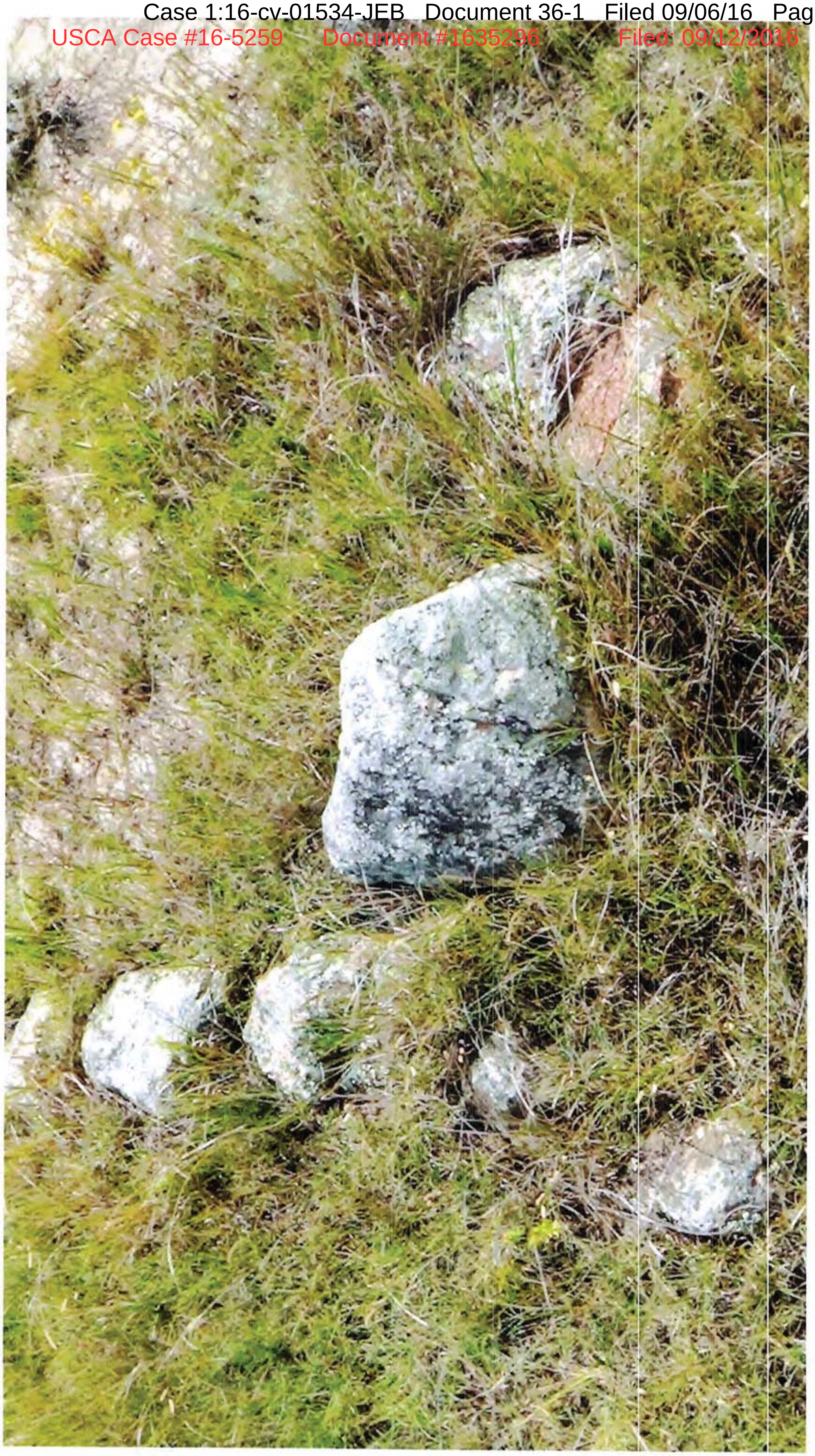
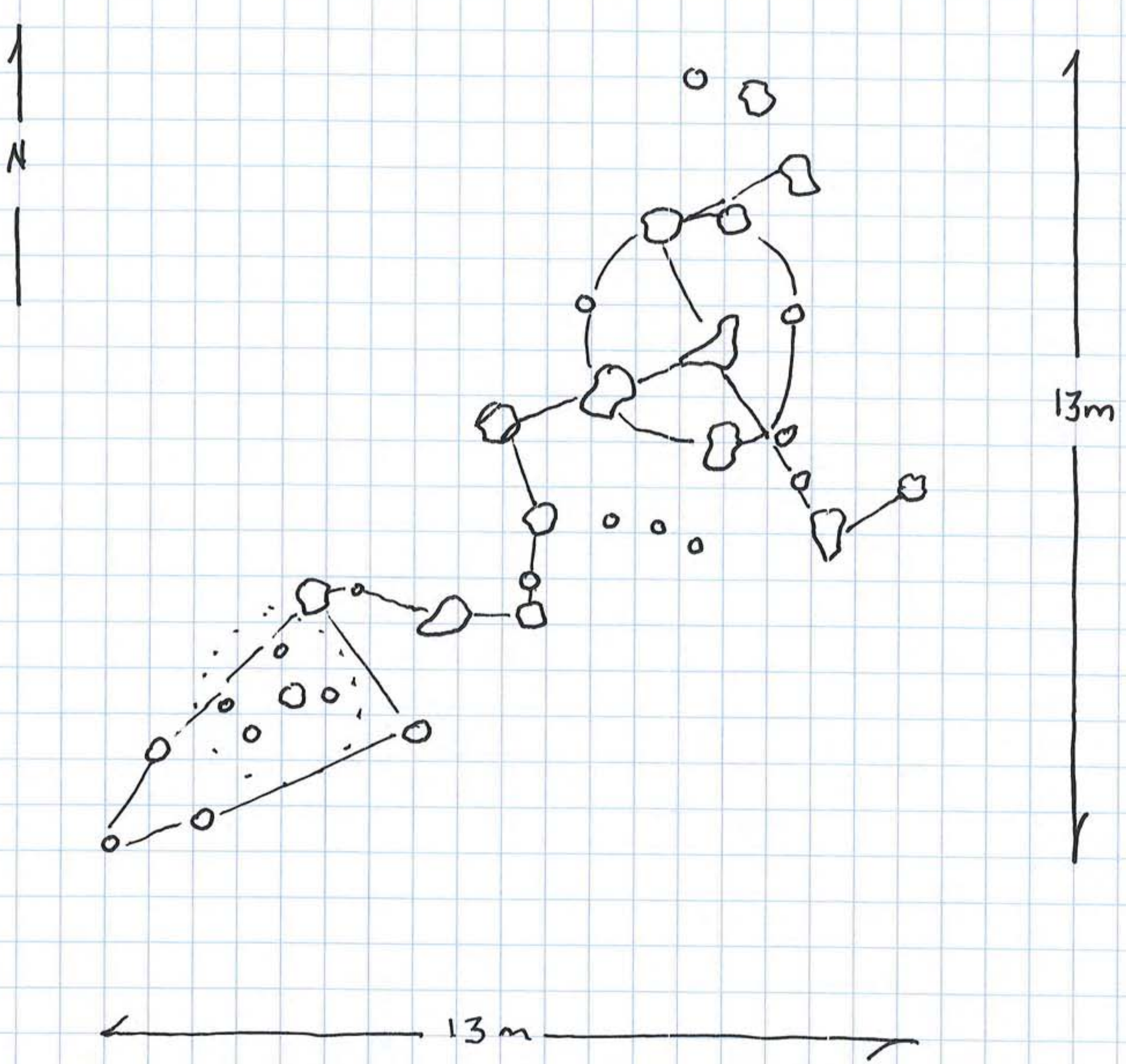


PHOTO # 78

TM3F083116

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KM4F083116 Photo #N/A



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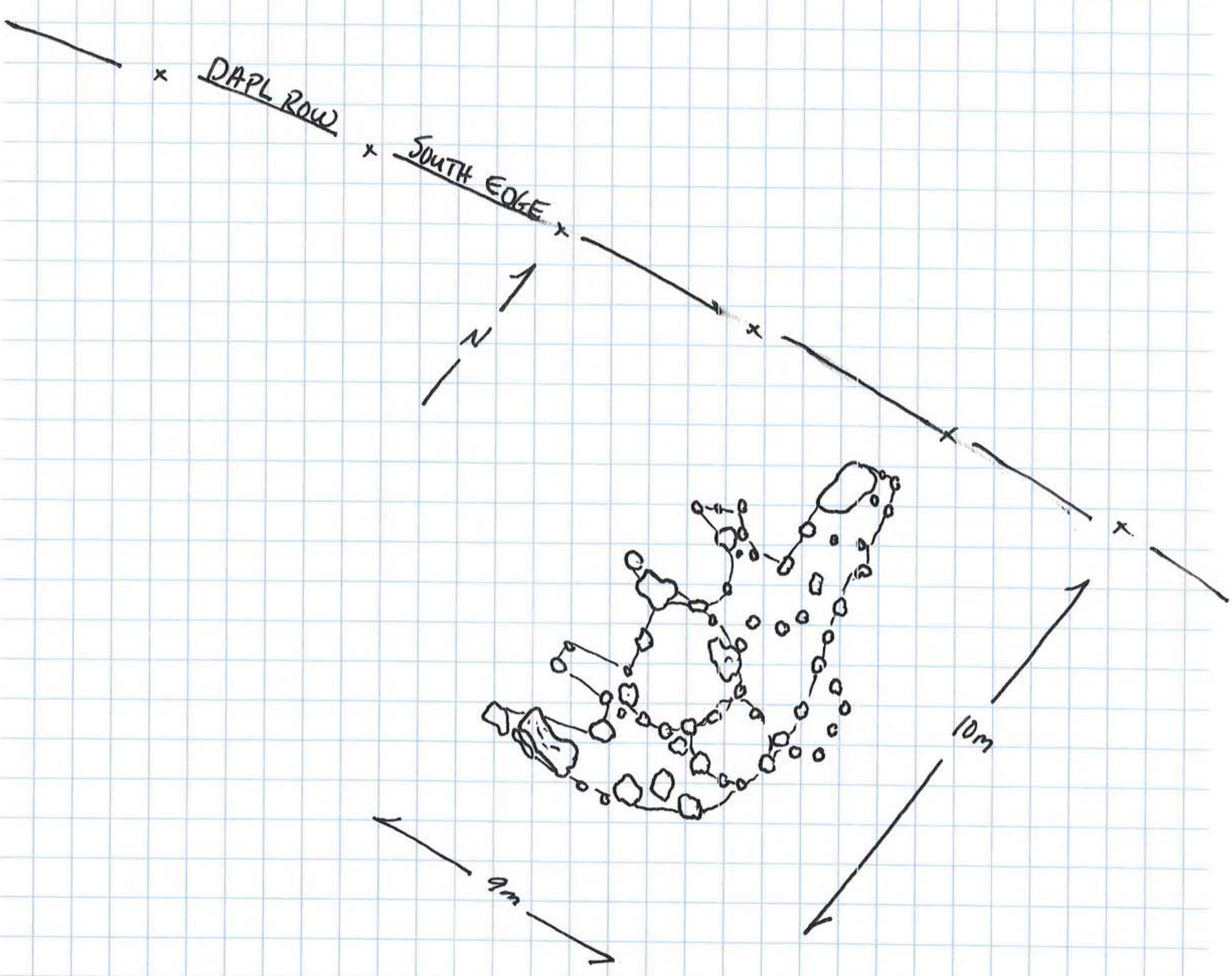
Makoche Wowapi

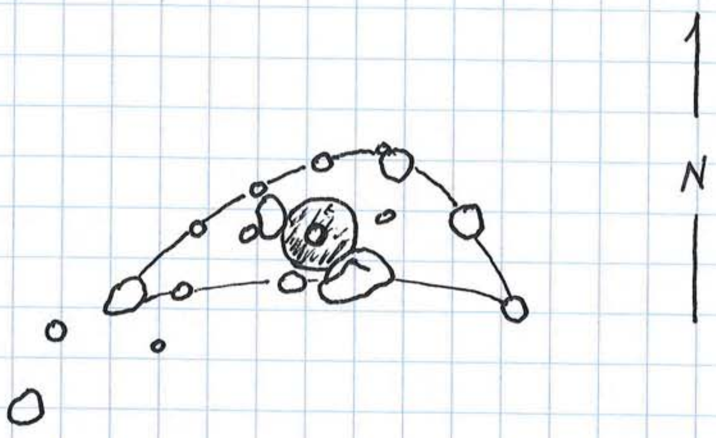
Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KMSF 083116 Photo #N/A


DAPL ROW
SOUTH EDGE
N
10m
9m

MAP/DRAWING IS NOT TO SCALE

Makoche Wowapi

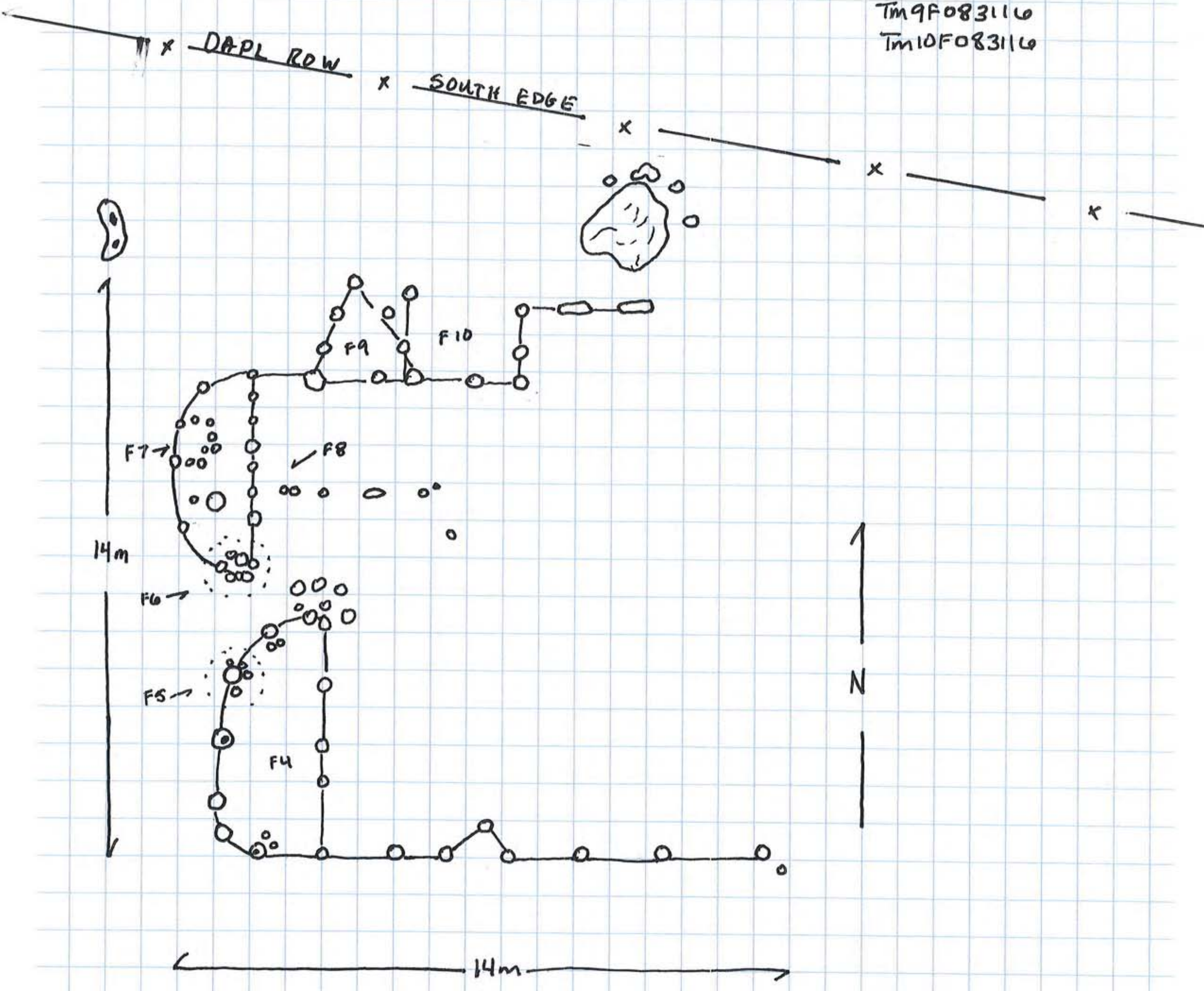
Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: LA3F083116 Photo #N/A



MAP/DRAWING IS NOT TO SCALE

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: TM4F083116 TM5F083116 TM6F083116 TM7F083116 TM8F083116 TM9F083116 TM10F083116 Photo: -# 79 -# 80 -# 81


DAPL ROW
SOUTH EDGE
F9
F10
F7
F8
14m
F6
F5
F4
N
14m

MAP/DRAWING IS NOT TO SCALE

TM5F083116

PHOTO #79

TM6F083116

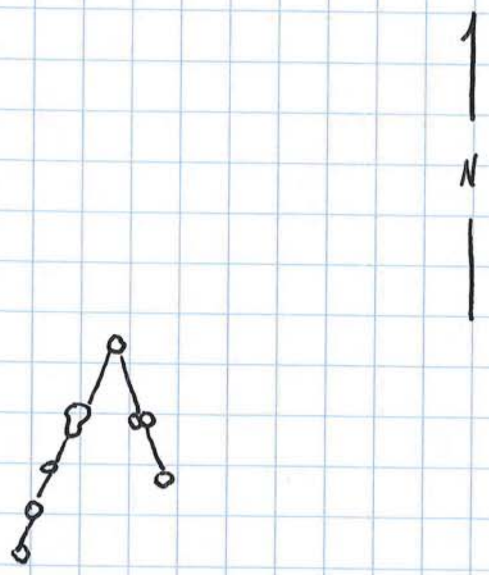
PHOTO # 80

TM7F083116

PHOTO # 81

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KM6F083116 Photo #N/A



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Makoche Wowapi

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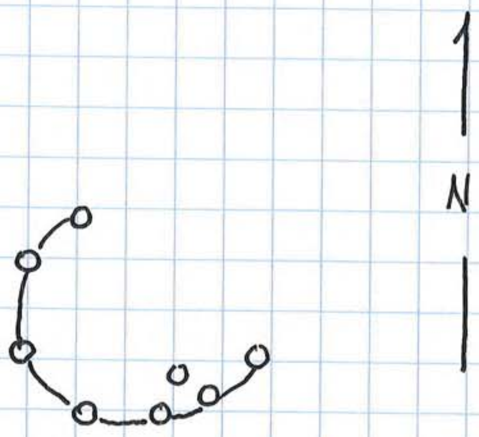

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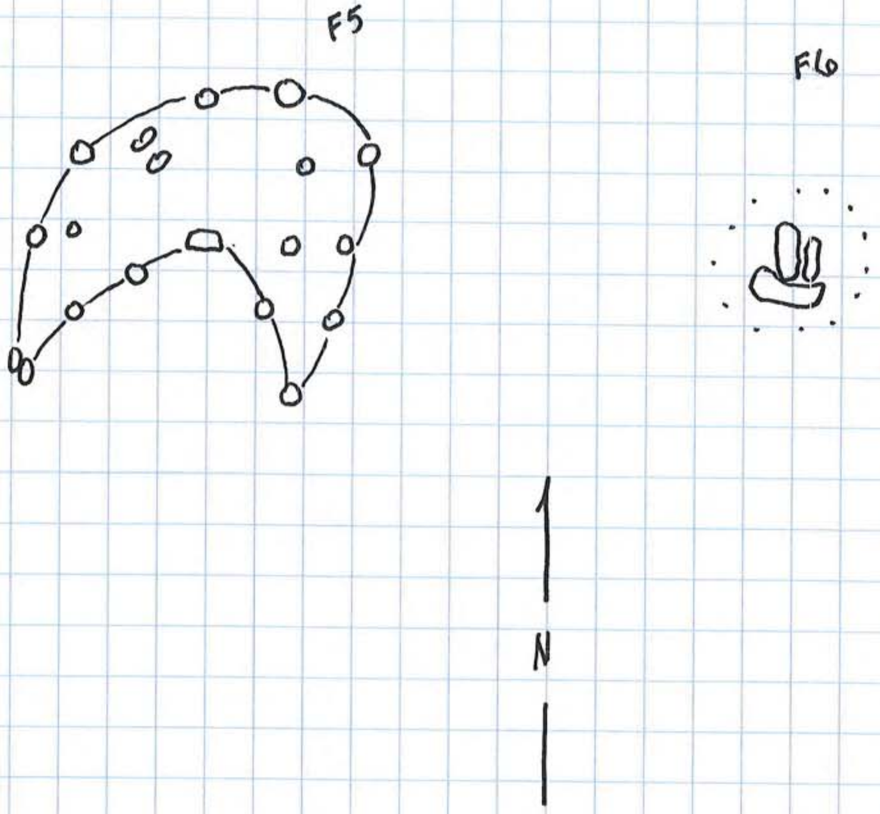
Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: LA5F083116 Photo #N/A
LA6F083116



MAP/DRAWING IS NOT TO SCALE

Makoche Wowapi

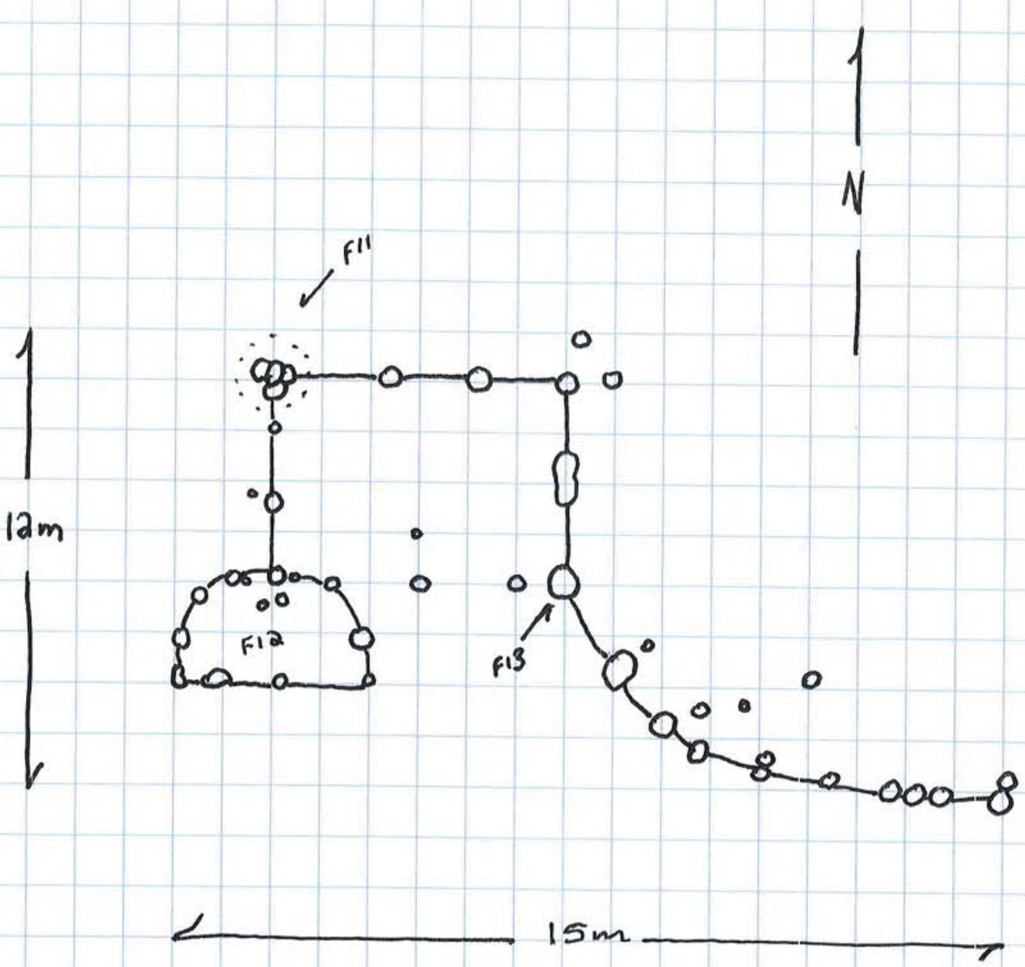
Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KM9F083116 Photo #N/A

DAPL ROW SOUTH EDGE
N

MAP/DRAWING IS NOT TO SCALE

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: Tm 11F083116 Photo # 82
Tm12F083116
Tm13F083116



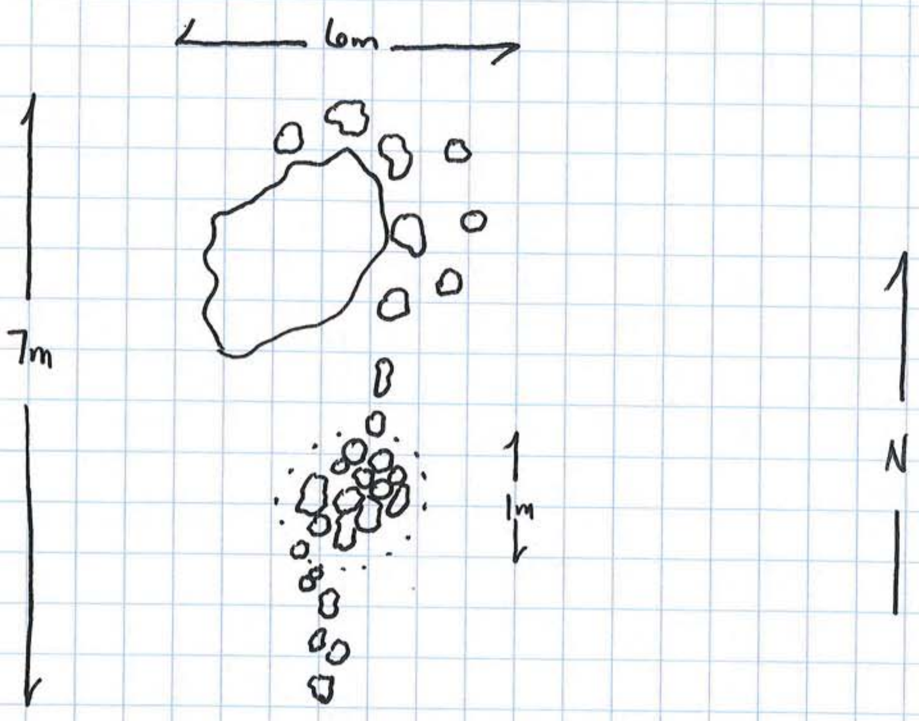
MAP/DRAWING IS NOT TO SCALE

TM 11F083116

PHOTO # 82

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KM10F083116 Photo #N/A



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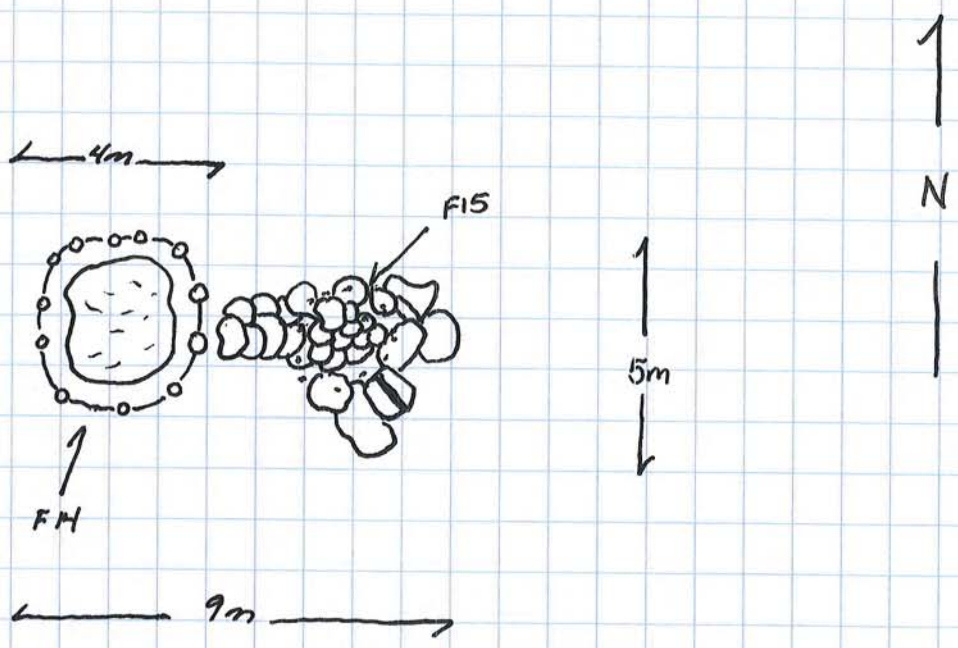
Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: TM 14F083116 Photo # 83
TM 15F083116 84



MAP/DRAWING IS NOT TO SCALE

TM14F083116

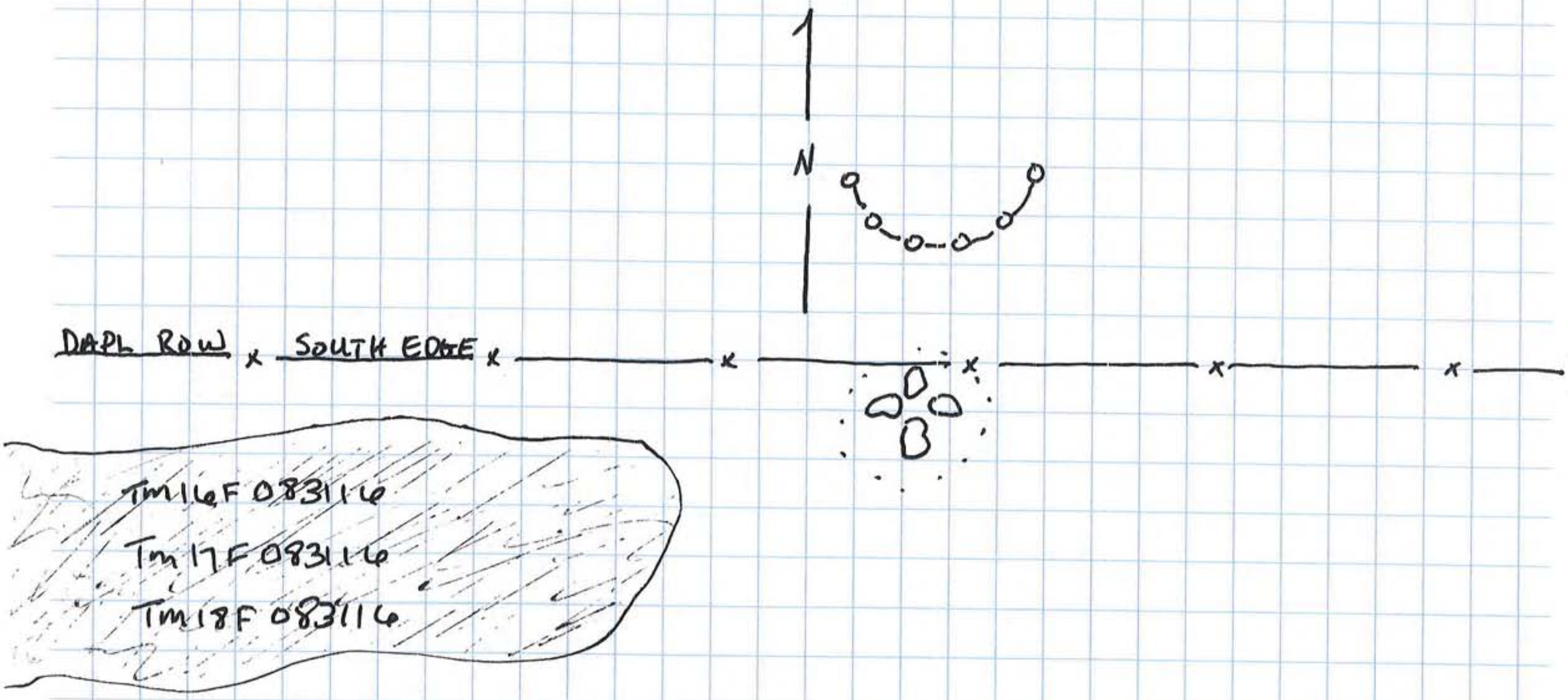
PHOTO # 83

TM15F083116

PHOTO # 84

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: KM12F083116 Photo #: N/A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DAPL ROW
SOUTH EDGE
TM16F083116
TM17F083116
TM18F083116

MAP/DRAWING IS NOT TO SCALE

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: Tm16F083116 Photo # 85
86
Tm17F083116
Tm18F083116

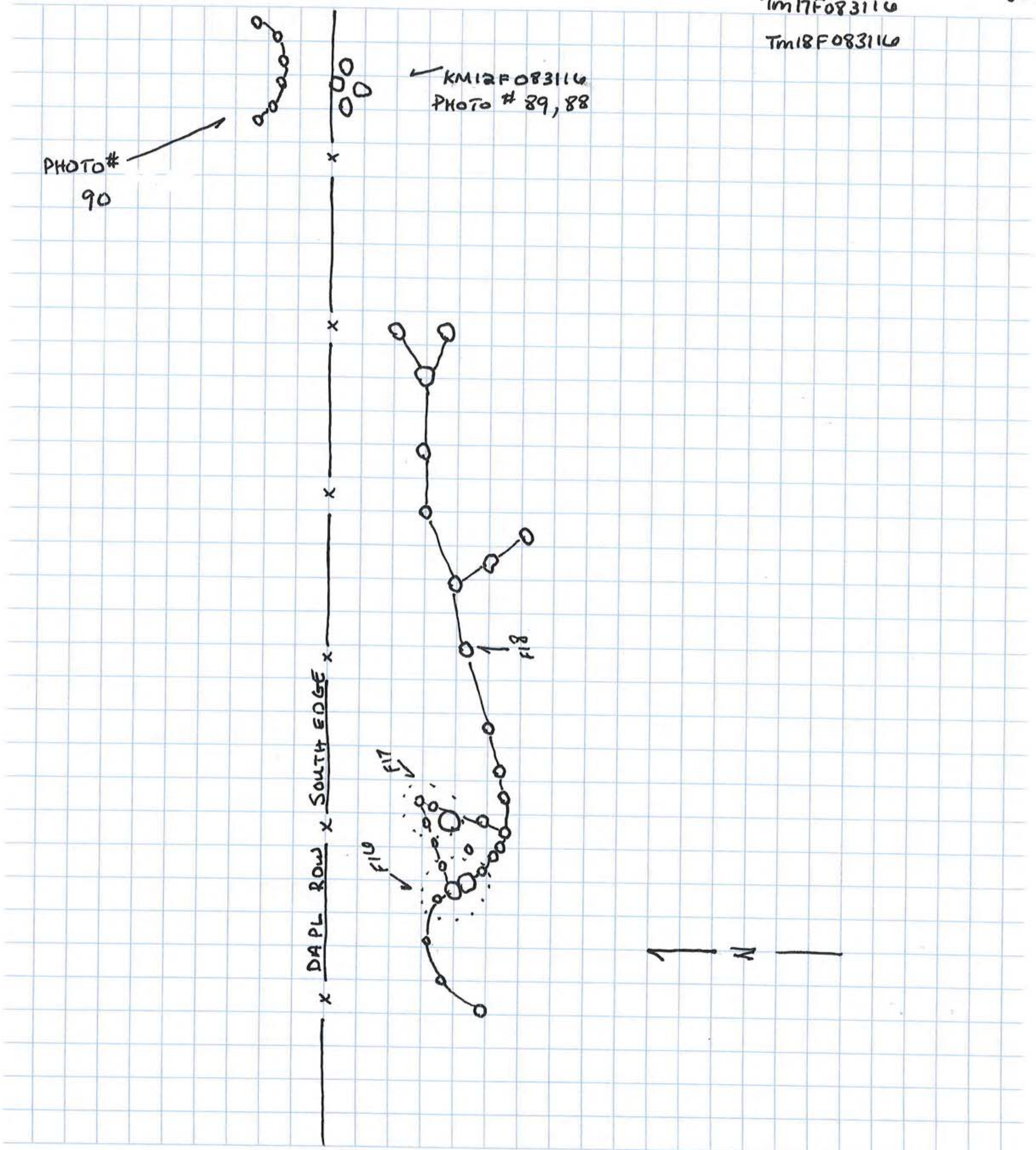
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PHOTO # 89, 88
PHOTO#
90
F18
F17
F19
DAPL ROW SOUTH EDGE
N

MAP/DRAWING IS NOT TO SCALE

PHOTO # 86

TM17F083116

PHOTO # 85

TM16F083114

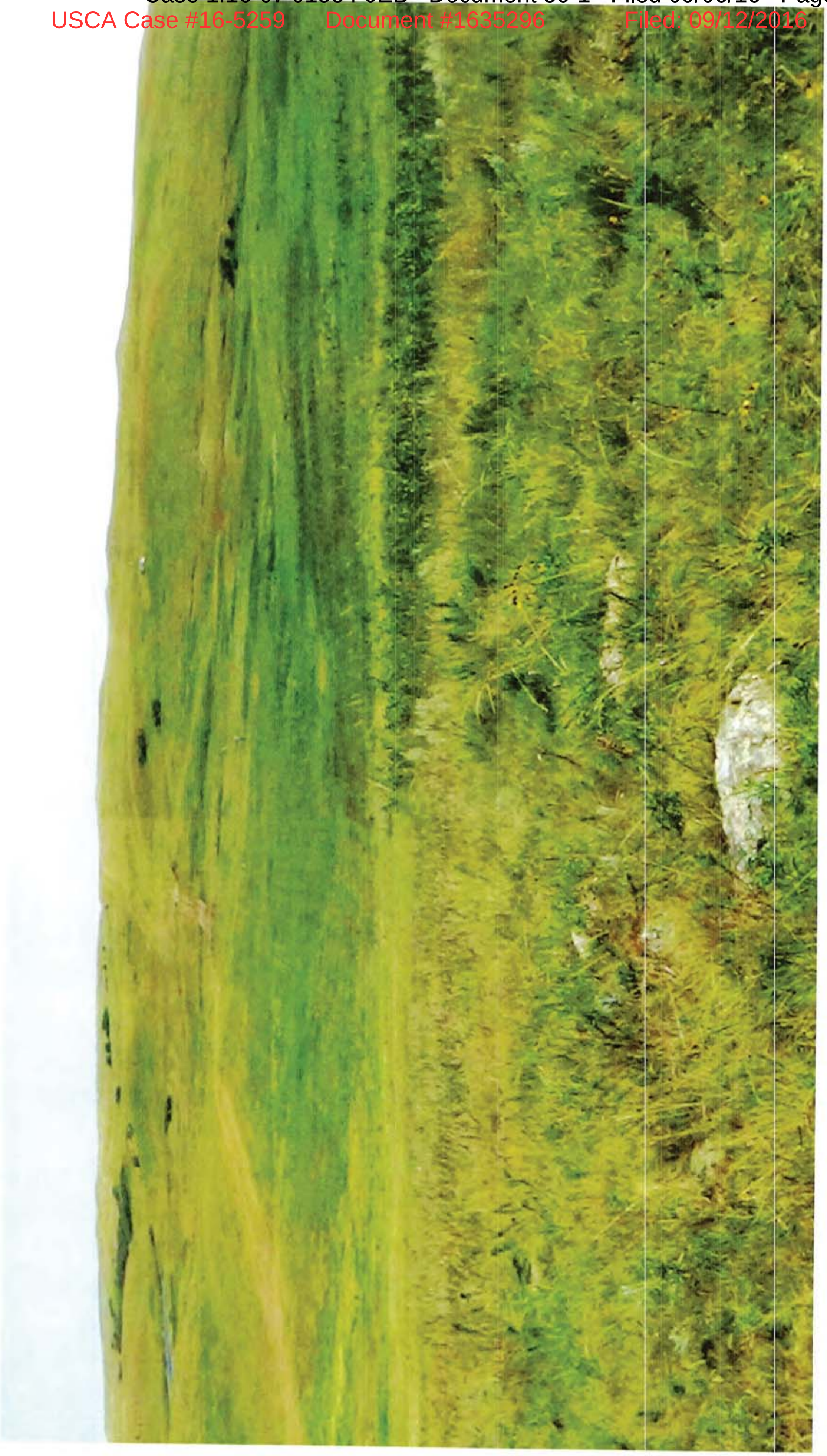

PHOTO # 88

KM12F0B3116

PHOTO #89

KM12F083116

PHOTO #90

KM12F083116

Makoche Wowapi

Project Name: MEYER PROPERTY Date: 8-31-16 Feature ID: LA7F083116 Photo #N/A
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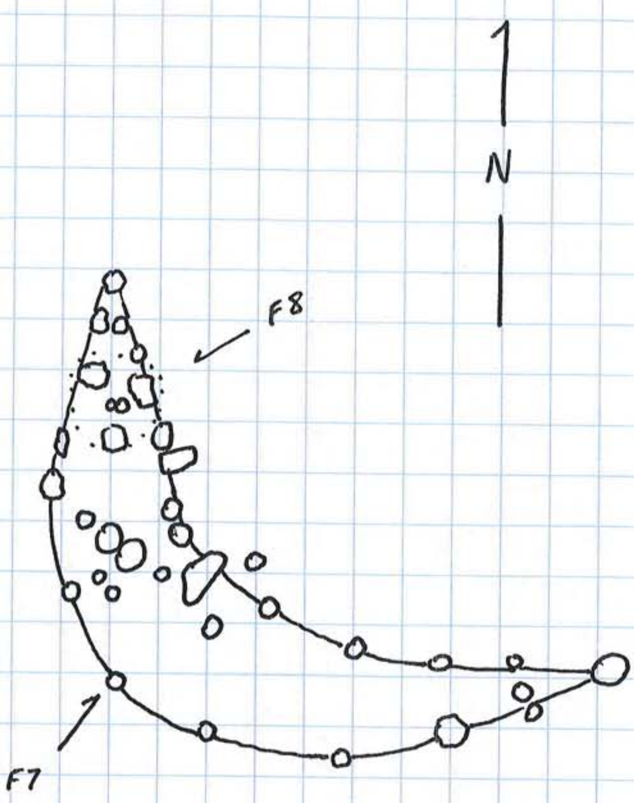

MAP/DRAWING IS NOT TO SCALE

ATTACHMENT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

DECLARATION OF TIM MENTZ, SR. IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

1. I have previously filed two declarations in this matter that describe my qualifications and expertise. I provide this additional declaration to describe events that took place in the last 48 hours since the filing of my last declaration.

2. On Friday, September 2, 2016, I provided the Court with a declaration that described a number of important and unusual archaeological finds that I made, with my company, over a two mile stretch of land west of Highway 1806 near Cannon Ball, North Dakota, in and adjacent to the right of way for the Dakota Access pipeline ("DAPL"). It described numerous gravesites and culturally important stone features.

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3. On the morning of Saturday, September 3, 2016, DAPL construction crews graded the entire corridor that was described in my declaration. I visited the site shortly after construction crews left for the day, at approximately 4 p.m. From where I stood along the road, I could see that a significant portion of the site we'd surveyed had been cleared. My son walked the length of the site and confirmed that the entire area that we had surveyed that week had been graded to a depth of more than a foot.

4. On the morning of Sunday, September 4, 2016, I requested permission of the landowner to return to the site to conduct a formal damage assessment. This time, permission was denied.

5. Even without a formal damage assessment, my conclusion from what I have been able to see is that any site that was in the pipeline corridor has been destroyed. Sites that are immediately adjacent the pipeline corridor are buried under berms of soil and vegetation that are as high as eight to ten feet. Anything under those berms is damaged if not destroyed. Portions of some sites out of the right of way may be undamaged but subject to additional harm if construction continues.

6. Shortly after completing the declaration on September 2, 2016, I contacted the State Historic Preservation Office to request that they visit the sites I'd found and confirm their significance. Because it was late in the day prior to a holiday weekend, no one was in the office and hence the SHPO did not confirm these sites before they were damaged or destroyed.

7. I note that normally grading a site like this for utilities or a highway would result in relatively shallow grading and berms on one side of the right of way of around two feet. Here, it appears that DAPL dug substantially deeper than normal, as I saw berms of 8 to 10 feet on both sides of the right of way. In my experience this is unusual.

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8. Normally in a situation like this, the Tribe would seek an opportunity to look for human remains in these berms so that our relatives could be reburied. This is very important to us. We successfully fought for a change in state law that set up the North Dakota Tribal Re-internment Committee to rebury relatives that are disturbed by construction like this. In such a situation, the soil in the berms is spread out and screened for human remains. In my view, given the high concentration of gravesites in this area, there are likely human remains in the berms. These are not conventional burials six feet under ground—bodies were placed on or near the surface with rock cairns over them. That is why grading a foot or two feet is likely to disturb these sites. It is common for remains to be disturbed in this way, as it is all but impossible for the operator of a bulldozer, sitting high above the site, to see what is happening below.

9. The elders say that reburying can help deal with the loss and hurt of disturbing these graves. These are people whose graves are in some cases known about and who have family connections in Cannon Ball. We want an opportunity to rebury our relatives. We normally are given this opportunity if gravesites are disturbed.

10. I do not believe that the timing of this construction was an accident or coincidence. Based on my observations, the nearest area of construction in the right of way west of Highway 1806 is around 20 miles away. It appears that DAPL drove the bulldozers approximately 20 miles of uncleared right of way to access the precise area that we surveyed and described in my declaration. The work started very early in the morning and they were accompanied by private security with dogs and with a helicopter overhead, indicating that the work was planned with care and that controversy was expected.

11. It is generally known that DAPL's construction crews don't normally work on weekends. To the best of my knowledge, this work over a holiday weekend was unusual.

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12. The pipeline route east of 1806 traverses around a mile or so to the Lake Oahe site. It has not been cleared or graded yet. The Tribe has not yet had an opportunity to survey this area for cultural artifacts and graves. Based on my experience in this area, I believe that there is a strong possibility that such sites are present in and adjacent to the pipeline right of way. There are a large number of graves in this area, some of which are known to families in the Cannon Ball community.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on September 4, 2016, at Fort Yates, North Dakota.

Tim Mentz, Sr.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2016, I electronically filed the foregoing *Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
Jan E. Hasselman

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ATTACHMENT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

DECLARATION OF THOMAS F. KING, Ph.D. IN SUPPORT OF PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL

I, Thomas F. King, declare as follows:

QUALIFICATIONS AND RELEVENT EXPERIENCE

1. My name is Thomas F. King. I hold a Ph.D. in anthropology from the University of California, Riverside, with an emphasis in archaeology. I have approximately fifty years' experience working with the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA) and related federal laws and regulations, as well as with American Indian tribes, Native Hawaiian organizations, and other indigenous and minority groups. My curriculum vitae is attached.

2. In 1975-76, I worked for the National Park Service (NPS) in Washington DC,

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drafting regulations and guidelines relating to the National Register of Historic Places, including work on the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (https://www.nps.gov/history/local-law/arch_stnds_0.htm). In 1977-79, I headed the staff of the "State" Historic Preservation Officer of the Trust Territory of the Pacific Islands. From 1979 until late 1988, I worked for the Advisory Council on Historic Preservation (ACHP) in Washington D.C. as director of its "Office of Cultural Resource Preservation," overseeing NHPA Section 106 review throughout the federal government. I was substantially involved in drafting revisions to the regulations governing compliance with Section 106 of the NHPA (36 C.F.R. Part 800). I also assisted the National Park Service during this period in developing the Secretary of the Interior's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act (https://www.nps.gov/fpi/Section110.html).

3. While employed by the ACHP, one of my assigned tasks was to negotiate with the U.S. Army Corps of Engineers about its narrow interpretation of its responsibilities under NHPA Section 106 in the context of its regulatory program, addressing effects on historic properties only in areas over which it has regulatory control. I attempted to negotiate a construction that would bring the Corps into line with other federal agencies, the ACHP's regulations, and the letter of Section 106 – which requires taking the effects of federal actions into account, not merely those direct effects over which a federal agency has control. The Corps, however, persisted and continues to persist in considering not the full range of effects of its permitted projects, but only those effects that fall under its regulatory control. Indeed, today I find the Corps deeply resistant to considering any effect that the applicant for its permit does not itself identify and report to be significant.

4. I left government service in 1989 and now operate a veteran-owned consulting

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firm, assisting tribes, property owners, federal agencies and others with project review and consultation under the NEPA and NHPA. I have continued to do what I can to assist the ACHP, National Trust for Historic Preservation, and others to prevail on the Corps of Engineers to comply with 36 CFR Part 800.

5. In the late 1980s, observing that common practice under the NHPA was coming to discriminate against the cultural interests and values of Indian tribes, other minority communities, and citizens in general in favor of narrow "professional" interests, I co-authored National Register Bulletin 38 with my wife, the late cultural anthropologist Patricia L. Parker, an NPS executive who later headed the agency's tribal liaison program. Bulletin 38 reminded federal agencies that what we called "traditional cultural properties" – that is, places of cultural importance to tribes and local communities – could be eligible for the National Register of Historic Places (NRHP), and that impacts on them hence had to be addressed under Section 106 of the NHPA. Publication of the bulletin was supported by the ACHP and Department of the Interior as well as by tribes and intertribal organizations. It was published in 1990, but some agencies were, and in some cases still are, resistant to considering impacts on traditional cultural properties.

6. Since leaving government, I have authored, co-authored, and edited ten books on topics related to the NHPA and NEPA, historic preservation and archaeology. One of these, *Cultural Resource Laws and Practice* (https://www.amazon.com/Cultural-Resource-Practice-Heritage-Management/dp/0759121753), is now in its fourth edition. Another, *Places That Count* (https://www.amazon.com/Places-That-Count-Traditional-Properties/dp/0759100713), is specifically about traditional cultural properties. Another, *Consultation and Cultural Heritage*, (https://www.amazon.com/Consultation-Cultural-Heritage-Reason-Together/dp/1611323991), is

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about methods of consultation with tribes and others; and another, *The Archaeological Survey Manual* (https://www.amazon.com/Archaeological-Survey-Manual-Gregory-White/dp/1598740091) details archaeological survey methods. I have recently served as guest editor of a special issue of *Environmental Practice* (https://www.cambridge.org/core/journals/environmental-practice), the journal of the National Association of Environmental Professionals, dealing with "cultural resources" and the NEPA. I have conducted traditional cultural property studies in California, Kentucky, Virginia and Wisconsin, and provided training and consulting services to many tribes, citizen groups, Native Hawaiian organizations, State Historic Preservation Officers (SHPOs) and federal agencies, most recently the Department of Veterans Affairs, for whom my company carried out a variety of historic preservation activities throughout the United States and overseas, mostly with reference to the requirements of the NHPA.

7. In 1991-2, I assisted then-Senator Wyche Fowler (D-GA) in preparing comprehensive amendments to the NHPA, which Congress enacted in 1992. Among these amendments was Section 110(k), now codified as 54 U.S.C. 306113, which prohibits issuance of a federal permit or license to "an applicant who, with intent to avoid the requirements of section 106 of [the NHPA] has intentionally significantly adversely affected a historic property to which the grant would relate, …. unless the [responsible federal] agency, after consultation with the [Advisory] Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant." We also worked with tribes and intertribal organizations impatient with an agency's unwillingness to consider impacts on traditional cultural properties; this resulted in the addition of Section 101(d)(6) to the NHPA, reminding agencies that places of "traditional religious and cultural importance to an Indian tribe or Native

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Hawaiian organization" can be determined eligible for the National Register, and directing agencies to consult with tribes and Native Hawaiian organizations during Section 106 review. Other subsections of Section 101(d) were added providing for Tribal Historic Preservation Officers and otherwise enlarging or clarifying the roles of tribes and Native Hawaiian organizations in NHPA implementation.

OBSERVATIONS ON THE QUALIFICATIONS, WORK, AND FINDINGS OF TIM MENTZ, SR.

8. I have reviewed the declarations filed with the Court by Tim Mentz, Sr., including their various attachments. I have known Mr. Mentz professionally for twenty years or more.

9. In my opinion, Mr. Mentz possesses all the qualifications necessary to perform the studies that inform his declarations. I assume that some who wish to discredit his conclusions will challenge his lack of an academic degree, but something I learned many years ago, and tried to express particularly in National Register Bulletin 38, is that when it comes to understanding the cultural history of a place, academic training is no substitute for the deep knowledge that comes from lifelong immersion in the local culture. As we tried to make clear in National Register Bulletin 38, to demean the knowledge of a traditionally trained member of a tribal or other local community simply because that individual has not been vetted by an academic institution is ethnocentric in the extreme. Particularly during my tenure in Micronesia, I learned that for the purposes of identifying and interpreting indigenous historic properties, spending one's life in the traditional culture and history of a tribe or other community is at the very least equivalent to graduate-level academic training, if not superior to it. Presumably NPS found Mr. Mentz to be qualified to serve as the Tribal Historic Preservation Officer for the Standing Rock Reservation, and to the best of my knowledge he served in that position with distinction. I have every confidence in Mr. Mentz's qualifications. It would be another matter if

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he were trying to interpret, say, the historical archaeology of Washington, D.C., but he is not; he is applying his expertise to precisely the area, and the resources, to which they are most relevant.

10. Indeed, in reviewing Mr. Mentz's declarations and attachments, I was struck by the fact that he could interpret things he saw on the ground that would have completely befuddled me or, I suspect, any other outside "expert." His ability to do so is presumably derived from his lifelong experience within the traditional culture of the bands comprising the Standing Rock Sioux Tribe. I would argue that he is far more qualified to identify and interpret cultural places associated with those bands than is any outside party, including myself. Of course, a critic might argue that his observations are not supported by the kinds of data a professionally trained archaeologist might organize and employ, but one could at least equally well argue that the observations of a professionally trained archaeologist from outside the tribe are deficient because they are not based on the deep cultural knowledge that Mr. Mentz brings to his observations. I am very much impressed with Mr. Mentz's ability to translate the cultural values of his people into terms that are understandable to non-tribal NHPA specialists.

11. In reviewing Mr. Mentz's declarations and attachments, which include field recording forms, sketch maps, and photographs, I found them to be entirely consistent with standard best practices in archaeological survey as generally practiced in the United States, and as recommended in *The Archaeological Survey Manual* referenced above. I am not a specialist in archaeological survey on the Northern Plains, so cannot comment on how closely Mr. Mentz's notes comport with standard practice in the area, but I think it should also be noted the Mr. Mentz's work was not carried out under optimal conditions. In many cases he and his team were recording sites by looking at them from a distance, because they were denied access to the pipeline right-of-way. It appears to me that their notes, maps, and photographs are consistent

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with one another, and provide a consistent portrait of what they observed.

12. Based on what I have reviewed, and with reference to other similar cases in which I have been involved over the last half-century, it appears to me that what Mr. Mentz and his team recorded was part of a cultural landscape that is – or was – eligible for the National Register of Historic places both as a traditional cultural property under National Register Criteria (a), (c), and perhaps (b), and as a complex of archaeological sites under National Register Criterion (d) (See 36 CFR § 60.4).

13. Both Mr. Mentz's data and video I have viewed that reportedly was captured during the event indicate to me that the pipeline company, having learned of Mr. Mentz's findings, effectively destroyed the sites he and his team had recorded. It is hard for me to comprehend this action as anything but a willful effort to destroy historic properties to avoid review under NHPA Section 106. As a concerned citizen, I have notified the Secretary of the Army's office of this destruction and requested that it be investigated with reference to Section 110(k) of the NHPA.

OBSERVATIONS ON HANDLING CASES OF THIS KIND UNDER SECTION 106 OF THE NHPA

14. The kinds of cultural landscape features recorded by Mr. Mentz and his team, although specific in character to the cultural history of the Standing Rock Sioux Tribe, are not entirely uncommon throughout the United States, and have been the subjects of NHPA Section 106 review in the past. One obvious example is the Turners Falls Sacred Ceremonial Hill Site in Massachusetts, found eligible for the National Register in 2008 by the Keeper of the National Register (See https://www.nps.gov/nr/.../turnerfallsdoedecision-redacted.pdf). This site is a complex of stone cairns, alignments, and similar structures associated with the traditional cultural values and history of the Narragansett and Wampanoag Tribes. It was recorded in the

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course of NHPA Section 106 review of an airport project proposed for assistance by the Federal Aviation Administration. Many other traditional cultural properties have been determined eligible for the National Register in connection with Section 106 review; a notable recent case not too distant from the Standing Rock Reservation area is that of Badger Two Medicine, an extensive landscape important to the Blackfoot Tribe and managed by the USDA Forest Service and the Bureau of Land Management (See http://indiancountrytodaymedianetwork.com/2015/11/24/collective-sigh-relief-interior-cancels-badger-two-medicine-drilling-lease-162541).

15. Where NHPA Section 106 review is carried out in an orderly way, historic places of all kinds, including traditional cultural properties, are identified early in project planning through consultation among interested parties (notably including concerned Indian tribes) and through whatever field studies are appropriate; this is necessary in order for the responsible federal agency to "take into account" the effects of the proposed action on historic properties – the fundamental requirement of Section 106.

16. Having identified historic places, the responsible federal agency then consults further with the project proponent and other interested parties - again including concerned tribes – to determine what effect the project may have on them and what can be done to resolve any effects that are adverse. Resolution may mean avoiding adverse effect altogether – by not carrying out the project or relocating it, or it may mean adjusting it to reduce the impacts to agreed-upon levels, or to compensate for them. Or it may mean accepting an adverse effect in the public interest, despite the damage it will do. Critically, however, these resolution decisions are not made unilaterally by the responsible federal agency or project proponent, and they are not made in an information vacuum; they are informed by both data and, critically, consultation with

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those affected, including tribes. Consultation is clearly defined in the ACHP regulations at 36 C.F.R. § 800.16(f) as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, *seeking agreement with them* regarding matters arising in the section 106 process" (emphasis added).

17. If agreement cannot be reached on ways to resolve adverse effect, the ACHP renders a formal comment to the head of the responsible agency, which then makes a final decision. This is what happened in the Badger Two Medicine case, which involved permits to conduct oil and gas exploration. The ACHP recommended against issuing the permits, and the Forest Service and Bureau of Land Management were persuaded; the permits were not issued. In a somewhat earlier case involving a planned wind energy facility in the midst of Nantucket Sound – a National Register eligible traditional cultural property – the ACHP recommended against allowing the project to proceed (See www.achp.gov/.../CapeWindComments.pdf), and the responsible agency (the Department of the Interior) decided that in the public interest it had to reject the ACHP's recommendation and permit the project to be built.

18. In my experience, the vast majority of NHPA Section 106 cases are resolved through consultation to agreements. In those rare cases involving a final ACHP comment, the responsible agency sometimes follows the ACHP's recommendations to the letter, very rarely rejects them altogether, and in many cases finds some way to be responsive to the ACHP's recommendations without following them entirely.

19. So, had the Dakota Access Pipeline project been reviewed in accordance with NHPA Section 106 and its regulations, the cultural landscape documented by Mr. Mentz, and probably others, would have been identified early on and made the subject of good-faith consultation, leading to some kind of resolution.

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20. With respect to the situation as it now stands, in which the applicant has apparently destroyed much or all of what Mr. Mentz documented, the Department of the Army presumably will ascertain whether NHPA Section 110(k) prohibits it from issuing any permit for the project. Whatever its conclusion, there is still the problem of an apparently National Register-eligible property that has been destroyed. One could argue almost indefinitely about whether the landscape recorded by Mr. Mentz was in fact eligible for the National Register – though it appears obvious to me that it was – but the fact remains that it has been destroyed. What can now be done, in addition to not issuing permits for the Dakota Access Pipeline? Two Section 106 cases with which I am somewhat familiar provide some guidance.

a. At Blaine, Washington, in the late 1990s-early 2000s, the City government undertook construction of a sewage treatment plant with financial assistance from the U.S. Environmental Protection Agency. Through a series of remarkable missteps, the City's construction contractor bulldozed a cemetery associated with the Lummi Tribe. After litigation, an effort was made to do a sort of post-facto Section 106 review. The treatment plant was relocated, and the City funded work by tribal members literally to sift through the dirt bulldozed out of the site to find and appropriately rebury human remains (c.f. http://community.seattletimes.nwsource.com/archive/?date=20040415&slug= lummi15m).

b. Near Eager, Arizona, in 2011 the U.S. Fish and Wildlife Service assisted the Arizona Game and Fish Department in constructing a sport-fishing pond that turned out to coincide with an ancestral puebloan cemetery; the project was not properly reviewed under NHPA Section 106. Here again, the project was canceled but a post-facto Section 106 consultation resulted in agreement that the State would finance tribal recovery of

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human remains from the dirt piles graded out of the pond, for appropriate reburial (see http://www.achp.gov/docs/arizona-pond-project.pdf).

21. Whether such a "solution" would be relevant to the Dakota Access Pipeline situation is impossible for me to guess. It obviously would not resolve the adverse effects of the project, but it might provide a degree of relief to aggrieved tribal members.

I declare under penalty of perjury under the laws of the United State of America that the foregoing is true and correct.

Executed this 9th day of September, 2016, at Washington, D.C.

Thomas F. King, Ph.D.

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the foregoing *Declaration of Thomas F. King, Ph.D. In Support of Plaintiff's Motion for An Injunction Pending Appeal* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
Jan E. Hasselman

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Thomas F. King, PhD

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Cultural Resource Impact Assessment and Negotiation, Writing, Training

Employment

Presently: Proprietor, Thomas F. King PhD, LLC: private consultant, educator, writer, facilitator in cultural resource management and environmental review; cultural resource consultant to the U.S. Department of Veterans Affairs. Senior Archeologist, The International Group for Historic Aircraft Recovery Amelia Earhart Project.

Formerly: Trainer/Consultant, SWCA Environmental Consultants. Member, Sussex Archaeological Executive. Senior Instructional Consultant, National Preservation Institute. Expert consultant to U.S. General Services Administration, program director for Advisory Council on Historic Preservation, Consultant to the High Commissioner, Trust Territory of the Pacific Islands, Archeologist with the National Park Service, consulting archeologist, head of archeological surveys at San Francisco State University, UCLA, University of California Riverside. U.S. Navy veteran, WestPac 1960-62.

Education

PhD, University of California, Riverside, Anthropology, 1976.
BA, San Francisco State University (then College), Anthropology, 1968.
Certificate: Mediator, Bowie State University Center for Alternative Dispute Resolution, 1997.

Clients (in last two decades)

Government Agencies: U.S. Department of Veterans Affairs; U.S. National Park Service; U.S. Bureau of Reclamation; U.S. Bureau of Land Management; USDA Forest Service; USDA Farm Service Agency; U.S. Fish and Wildlife Service; U.S. Navy; U.S. Air Force; U.S. Army; Federal Aviation Administration; Grand Canyon Monitoring and Research Center; Yap State Historic Preservation Officer; Guam Historic Preservation Officer; City of Newport News, Virginia; City of Hingham, Massachusetts.

Indian Tribes & Other Indigenous Groups: Lummi Nation, Santa Ynez Band of Chumash Indians; Miami Tribe of Oklahoma; Viejas Tribe of Kumeyaay Indians; Fort Mojave Indian Tribe; Table Mountain Rancheria; Pechanga Band of Luiseño Indians; Big Pine Band of Paiute; Tuolumne Rancheria; Confederated Tribes of the Umatilla Reservation; Klamath River Intertribal Fish and Water Commission; Office of Hawaiian Affairs; Mole Lake Sokaogon Community of Lake Superior Chippewa Indians; Bad River and Red Cliff Bands of Lake Superior Tribe of Chippewa Indians; Hualapai Tribe; Quechan Indian Nation; Round Valley Indian Tribes; Penobscot Tribe.

Clients (cont.)

Private Sector: Blythe Energy Corp; Cingular Wireless; Odyssey Marine Exploration; Avista Utilities; Dripping Springs Ranch.

Non-profit organizations: Native American Rights Fund. California Unions for Reliable Energy; National Preservation Institute; Buckland Preservation Society; Piedmont Environmental Council, Backcountry Horsemen of California.

Courses Taught

Short courses for Department of Veterans Affairs, tribal clients, and others, and formerly for SWCA Environmental Consultants, National Preservation Institute, University of Nevada, Reno, General Services Administration, Advisory Council on Historic Preservation, Environmental Protection Agency, National Park Service, and Department of Defense. ***Subjects:*** cultural resource law and policy, Section 106 review, National Environmental Policy Act implementation, identification and protection of traditional cultural properties, Native American consultation, environmental justice, conflict resolution, and related subjects.

Publications (Selected)

Books and Monographs, Cultural Resource Management

- *Consultation and Cultural Heritage: Let Us Reason Together* (with Claudia Nissley). Left Coast Press 2014.
- *Cultural Resource Laws and Practice: An Introductory Guide* (Fourth edition) AltaMira Press 2012 (First edition 1998; second edition 2004; third edition 2008)
- *CRMudgeoneity*. Kindle Books, Amazon.com, 2011
- *Companion to Cultural Resource Management* (Editor). Wiley-Blackwell, 2011
- *Our Unprotected Heritage: Whitewashing Destruction of Our Natural and Cultural Environment*. Left Coast Press, 2009.
- *Saving Places that Matter: A Citizens Guide to the National Historic Preservation Act*. Left Coast Press 2007.
- *The Archaeological Survey Manual*. With Greg White. Left Coast Press 2007.
- *Doing Archaeology: a Cultural Resource Management Perspective*. Left Coast Press 2005.
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- *Thirteen Bones* (Historical Novel). Dog-Ear Press, 2009.
- *Amelia Earhart's Shoes*. With R. Jacobson, K. Burns, and K. Spading. AltaMira Press, Second edition 2004 (First edition 2001).

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Articles: Cultural Resource Management, Archaeology, History

- The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews. With Kurt E. Dongoske & Theresa Pasqual. *Environmental Practice* 2015 in press.
- Cultural Heritage, Environmental Impact Assessment, and People. In *Cultural Heritage Research* Volume 2 by the Chinese Academy of Social Sciences [CASS] (Proceedings of the World Archaeological Congress 2011 Beijing Intercongress on Heritage Management in Asia), Science Press Beijing 2013.
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- U.S. Government Burdens on the Exercise of Traditional Religions: Two Cases Provide Conflicting Interpretations. *International Journal of Cultural Property* 18(3):393-96, Cambridge, 2011.
- Archaeology of the Recent Past; The Legal Mélange; and A Future for Cultural Resource Management? Chapters in *Companion to Cultural Resource Management,* Wiley-Blackwell, 2011.
- Preservation, Sustainability, and Environmental Impact Assessment in Post-Colonial Developing Nations. In *Sustainability and Historic Preservation,* Richard Longstreth, editor. University of Delaware Press, Newark, 2011.
- Estudo de impacto ambiental, gestão de patrimônio cultural e bens históricos. Aprendendo com os erros dos Estados Unidos da América. Trans. By Rafael Brandi. *Cadernos de Ciências Humanas* 11 e 12, Números 20 e 21, 2008-2009 (2010); Universidade Estadual de Santa Cruz, Ilhéus-Bahia, Brasil,
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Articles (cont)

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- Entries on archaeological ethics, archaeology in environmental impact analysis, and deep-ocean archaeology in *The Encyclopedia of Archaeology,* Deborah M. Pearsall, ed. in chief, Elsevier, New York, 2007.
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- "Recent Cosmic Impacts on Earth: Do Global Myths Reflect an Ancient Disaster?" *About.com,* December 2007, http://archaeology.about.com/od/climatechange/a/masse_king.htm
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- "E-Book" environmental review software, for U.S. General Services Administration.
- "NEPA for Historic Preservationists and Cultural Resource Managers," worldwide web pages for National Preservation Institute.
- "Cultural Resource Management Checklist," interactive worldwide web pages for the United States Department of Veterans Affairs

Weblogs

- *Tom King's CRM Plus* -- http://crmplus.blogspot.com/
- *Amelia Earhart Archaeology* -- http://ameliaearhartarchaeology.blogspot.com/

ATTACHMENT 9

EXHIBIT 25

Preserving America's Heritage

March 15, 2016

Colonel John W. Henderson
District Engineer
U.S. Army Corps of Engineers
Omaha District
1616 Capitol Avenue, Suite 9000
Omaha, NE 68102

Ref: Dakota Access Pipeline Project

Dear Colonel Henderson:

The Advisory Council on Historic Preservation (ACHP) appreciates receiving your response, dated February 26, 2016, to our letter of February 3, 2016, conveying concerns raised by the Honorable David Archambault, Chairman of the Standing Rock Sioux Tribe. We have completed our review of your responses, and would like to follow up with the Omaha District of the Corps of Engineers (Corps) to clarify several issues.

Your letter indicated that the majority of the 1,100 mile pipeline will not be located on Corps managed lands, but rather on uplands. We understand that the project proponent, Dakota Access, has submitted 209 pre-construction notifications that are subject to Corps Section 404 permits. Given the sheer number of individual permits and the unlikelihood that the pipeline could be constructed but for the issuance of these numerous permits, it is unclear how the Omaha District concluded that its jurisdiction and responsibilities to assess environmental impacts from the broader undertaking are limited only to the 209 crossings. We urge the Corps to consider expanding its review of this undertaking by redefining the area of potential effects (APE) consistent with 36 CFR Section 800.16(d) of our regulations, "Protection of Historic Properties" (36 CFR Part 800). Furthermore, to ensure that the Corps fully meets its Section 106 compliance responsibilities, we recommend that you consider developing a programmatic agreement to address this complex undertaking in accordance with 36 CFR Section 800.14(b).

You have explained that the Section 106 programmatic agreement (PA) regarding the operation and maintenance of the Missouri River main stem sets forth a consultation process that the Corps is using to address its Section 106 compliance for the subject pipeline. Given that the PA only pertains to the operation and maintenance of the Missouri River main stem, it is unclear how it is serving as a framework, particularly when there are multiple Indian tribes who either did not sign the PA, or who were not included in the PA at all because their ancestral homelands do not include the Missouri River basin. Nevertheless, these Indian tribes have interests in areas that lie along the remainder of the pipeline and should be consulted in accordance with the Section 106 regulations.

Additionally, we remain perplexed by the Corps' apparent difficulties in consulting with the Standing Rock Sioux Tribe. We are in receipt of letters from both the THPO and the Chairman sent to the Corps throughout 2015, informing you of the tribe's interests and concerns regarding this project, and requesting Section 106 consultation meetings. The THPO clearly objected to the Corps' determinations, which should have triggered further review and consultation pursuant to the Section 106 regulations. The THPO also pointed out the fact that there was no tribal participation in the identification efforts, and suggested that an inventory of traditional cultural properties (in statutory terms, historic properties of religious and cultural significance) be conducted given the location of burials and other types of historic properties in the project vicinity. It is troubling to note that the THPO's letters indicate the Corps took more than 7 months to address the tribe's specific concerns.

On March 4, the ACHP met with Chairman Archambault and attorneys from Sonosky, Chambers, Sachse, Endreson, and Perry to discuss the tribe's numerous concerns about this project. Based on our meeting, we have the following additional questions to help the tribe and other consulting parties, including the ACHP, better understand the impacts of this project:

1. How will the comments received on the draft EA address tribal and cultural issues since they were never fully addressed?
2. How will this project address emergencies and disaster management issues given the recent pattern of emergency incidents in the Northern Plains region?
3. How does the draft EA address cumulative effects that may occur on tribal and cultural properties in proximity to the pipeline?
4. What will be the role of the applicant in addressing tribal concerns that are listed above?

We were pleased to see that the letter of March 2, 2016 from Ms. Chieply of the Corps to Indian tribes recognizes their special expertise in assessing the presence of, and potential eligibility of, historic properties that may possess religious and cultural significance and, inviting them to conduct tribal surveys along the Preconstruction Notification permit areas. We assume that since the ACHP's regulations require the consideration of alternatives to avoid or minimize impacts to historic properties, the Corps will consider alternatives to the pipeline's currently proposed alignment should historic properties of religious and cultural significance to a tribe be found in the APE. Nonetheless, we request that the Corps clarify our interpretation of this matter since it is not specifically addressed in your March 2, 2016, letter.

We look forward to receiving the Corps' response so that these outstanding issues can be resolved, and the Corps' review of this undertaking completed. Further, we remind you that the ACHP has formally entered the Section 106 consultation process to assist the Corps in complying with its Section 106 responsibilities. Should another Section 106 consultation meeting be scheduled soon, it is important that we be notified in advance so that we can consider attending in-person. Finally, prior to the Corps making any final decisions regarding its environmental review for the Dakota Access Pipeline Project, we encourage you to notify the ACHP, since NEPA and NHPA reviews are often coordinated by Federal agencies.

We appreciate the ongoing cooperation of the Corps in this matter. Should you have any questions regarding our request for additional information, please do not hesitate to contact Charlene Dwin Vaughn by telephone at 202-517-0207, or via e-mail at cvaughn@achp.gov.

Sincerely,

Reid J. Nelson
Director
Office of Federal Agency Programs

ATTACHMENT 10

Case No. 1:16-cv-1534-JEB

EXHIBIT 26

Case No. 1:16-cv-1534-JEB

Preserving America's Heritage

May 6, 2016

Colonel John W. Henderson
District Engineer
Omaha District
U.S. Army Corps of Engineers
1616 Capitol Avenue, Suite 9000
Omaha, NE 68102

Ref: Dakota Access Pipeline Project

Dear Colonel Henderson:

The Advisory Council on Historic Preservation (ACHP) received your letter dated April 11, 2016, responding to our letter of March 15, 2016. In our letter, we expressed concerns about the Corps of Engineers (Corps) compliance with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800) for the Dakota Access Pipeline (DAPL). Your response reiterates that the Corps has determined that it must follow procedures set forth in Appendix C of 33 C.F.R. part 325 (Appendix C) when complying with the requirements of Section 106, thereby limiting its jurisdiction to permit areas associated with activities in the Waters of the United States (WOUSA). We would like to further clarify our observations regarding your coordination of the Section 106 review for this undertaking, and recommend further steps the Corps should take to adequately consider effects to historic properties from this undertaking.

Undertaking and Area of Potential Effects

While the DAPL has a proposed right-of-way (ROW) extending more than 1000 miles from North Dakota, through South Dakota and Iowa, and into Illinois, Corps Regulatory only acknowledges jurisdiction over water crossings. Your review specifically focuses on 209 locations where pre-construction notifications (PCNs) were required from the project proponent according to the terms of the Corps' Nationwide Permit program. The Corps is considering each linear crossing to be a single and discrete undertaking for the purposes of Nationwide Permit (NWP) verification.

As you are aware, the ACHP's Section 106 regulations define the undertaking as the entire project, portions of which may require federal authorization or assistance. The Area of Potential Effects (APE) is the geographic area or areas within which the undertaking may affect historic properties, if any are present. We recognize that federal agencies may have limited jurisdiction over, or involvement in, an undertaking in some circumstances, limiting their ability to identify historic properties and to resolve adverse effects comprehensively throughout the APE for the entire undertaking. However, even in circumstances where such limitations exist, the federal agency remains responsible for taking into account the effects of the undertaking on historic properties.

ADVISORY COUNCIL ON HISTORIC PRESERVATION
401 F Street NW, Suite 308 • Washington, DC 20001-2637
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Further, with linear undertakings such as oil pipelines, we have previously advised the Corps to consider the number of crossings the Corps has jurisdiction over, and their placement throughout the ROW, in determining its responsibility to actively identify and consider effects on historic properties in the portions of the ROW located outside the water crossings. As noted in our March 15, 2016, letter, given the large number of water crossings and their likely distribution throughout the entire ROW, it may be appropriate to suggest that the water crossings enable or even determine the placement of the ROW. It is inescapable that the pipeline will need to cross WOUSA as it passes through four states. As such, the pipeline could not be constructed "but-for" the Corps permits required. Likewise, the procedures for NWP verification do not require that the project proponent submit PCNs for all water crossings. Therefore, there may be other crossings that do not require PCNs under General Conditions 20 and 31 because the project proponent does not know of, or anticipate, the presence of historic properties located at those crossings or requiring compliance with Section 106.

When considering the definition of the undertaking and the APE, the Section 106 regulations reference the level of federal involvement as one issue to consider when characterizing the scope of the identification effort federal agencies must engage in to meet the reasonable and good faith standard for the identification and evaluation of historic properties per our regulations. In the case of DAPL, three Corps regulatory offices, a Corps Civil Works facility, the Farm Service Agency, and the United States Fish and Wildlife Service all have actions related to portions of the larger undertaking. Accordingly, it appears that the level of federal involvement justifies a greater federal effort to identify and evaluate historic properties.

Consultation with Federally Recognized Tribes

As you know, the Section 106 regulations require that a federal agency identify tribes that may ascribe religious and cultural significance to historic properties that may be affected by an undertaking, and invite them to participate in the Section 106 consultation. They are recognized as consulting parties "by-right" if they so request. The federal agency must consult with them in a manner that acknowledges the government-to-government relationships between federally recognized tribes and the federal government. Such consultation must include providing the tribes with sufficient information and documentation, and a reasonable review period that enables them to make informed decisions regarding the sufficiency of the federal agency's compliance with Section 106, including findings and determinations the agency makes as it moves through the Section 106 review. The Section 106 regulations also require that the federal agency recognize the special expertise of tribes when determining the significance of properties of religious and cultural significance to them.

The ACHP remains concerned that because of the involvement of multiple Corps districts and other federal agencies, consultation with tribes and the information supplied to them in response to their inquiries has been inadequate and fragmented. Tribes should have opportunities to review and comment on the identification and evaluation efforts, assessments of effects, and the other related tribal issues where they have special expertise. Unfortunately, the coordination of the Corps, thus far, has not resulted in productive tribal consultation consistent with the Section 106 regulations. The concerns expressed by the Chairman of the Standing Rock Sioux Tribe (SRST) in his letter to the ACHP dated January 8, 2016, and those expressed by the Tribal Historic Preservation Officer (THPO) of the Iowa Tribe of Kansas and Nebraska in his letter to the ACHP dated March 25, 2016, exemplify our concerns. It is unclear to the ACHP how the Corps has ensured that the tribes had the opportunity to share relevant information about the potential presence of properties of religious and cultural significance to them in the vicinity of water crossings and within the project ROW that the applicant assumes will not require PCNs under General Conditions 20 and 31 of the NWP protocols.

Consulting Parties

The Section 106 regulations require that a federal agency identify other appropriate consulting parties, in addition to the "by-right" consulting parties identified in 36 C.F.R. § 800.2(c). Section 36 C.F.R. § 800.2(c)(5) of our regulations requires the agency official to consider requests from individuals and organizations with a demonstrated interest in the undertaking to participate as consulting parties "… due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." The ACHP encourages federal agencies to take a broad perspective on the range of stakeholders who may be appropriate to engage as consulting parties. It is the federal agency's responsibility to share with the consulting parties appropriate, and sufficient, background information and documentation to support its findings and determinations for Section 106 reviews. Further, this information should enable consulting parties, like the tribes, to review projects and prepare informed comments. Unfortunately, the Corps has yet to demonstrate how it has properly identified appropriate consulting parties and invited them to formally participate in the consultation process.

We have been copied on correspondence between Mr. Daniel Higginbottom, an historic preservation professional and affected property owner, and the Corps regarding his request to become a consulting party, as well as his request for information about the identification and evaluation effort for historic properties and other aspects of the Corps' review. We understand that Mr. Higginbottom has been recognized as a consulting party. Regrettably, he has not received any of the project documentation normally shared with consulting parties. Instead, his efforts to obtain information have been met with requests from the Corps for more specificity and exact locations of the sites he is concerned about. This demonstrates a fundamental lack of understanding about the requirements of the Section 106 process, the consultation process, and the obligations of the federal agency to engage consulting parties in all aspects of Section 106. This would include substantive information about the methods and results of surveys to identify historic properties throughout the undertaking. We, therefore, request the Corps to promptly take appropriate measures to remedy this failure to communicate.

Timing in the Section 106 Review

The Section 106 regulations require that a federal agency complete the Section 106 review prior to approving a project or issuing an authorization or assistance. Further, Section 110(k) of the NHPA prohibits *a Federal agency from granting a loan, loan grantee, permit, license or the assistance to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the ACHP, determines that circumstances justify granting such assistance despite the adverse created or permitted by the applicant*. We recently were advised that the Iowa Utility Board has ruled that Dakota Access violated its recent order by engaging in prohibited activities prior to obtaining all its permits and approvals by engaging in activities within the ROW including tree clearing within the Corps' jurisdictional PCN's for the purpose of eliminating Indiana Brown bat habitat prior to the start of the April 1 breeding season. Since this activity may have caused harm to, or precluded, the appropriate identification of historic properties in those locations, the Corps should investigate this issue and consult with the ACHP regarding the applicability of Section 110(k) before it proceeds with the Section 106 review.

Federal Agency Coordination

Previously, we mentioned concerns regarding the apparent lack of coordination among the multiple Corps districts and other federal agencies involved in DAPL who have actions related to this undertaking. Consulting parties and stakeholders are unsure to whom they should address their inquiries and concerns.

As noted, the information supplied by different federal agencies to the tribes, other consulting parties, and stakeholders in response to inquiries has often been inadequate. The agencies are making determinations of eligibility and effect findings that are not shared appropriately with consulting parties, limiting their ability to review and comment on time sensitive documents.

Pursuant to 36 C.F.R. § 800.2(a)(2), if more than one federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency who shall act on their behalf, fulfilling their collective responsibilities under Section 106. Although we understood that the Omaha District was specified to act as lead district for the three Corps districts, it is unclear how that has been manifest in the consultation process. Overall, there does not seem to be a lead federal agency that is acting as the main point of contact with consulting parties and stakeholders for the distribution of necessary information about the steps of the Section 106 review.

The federal agencies involved also need to consider the myriad tribal, procedural, and policy issues that may emerge during project implementation. We have previously recommended that the federal agencies consider developing a Programmatic Agreement (PA) that would clarify roles and responsibilities in the consultation process, and during project implementation. The PA also could specify how the project proponent must address issues that emerge, including emergency situations. At the least, findings of "no historic properties affected" or "no adverse effect" should include provisions that clarify how such eventualities have been reached.

Next Steps

We understand that the Corps will be convening a teleconference on May 9, 2016, with the tribes of the Upper Sioux Community. The outcome of the teleconference will likely identify other issues related to Section 106 that should be addressed by the Corps. We appreciate the invitation from the Corps to participate in the teleconference, and will do so. However, we note that there are many other federally recognized tribes who have concerns about this undertaking and also have requested to further consult with the Corps. We look forward to participating in follow-up calls that will provide these parties similar opportunities to share their concerns.

We are hopeful that the Corps will clarify how it intends to address the Section 106 consultation issues, the tribal issues, and the timing issues associated with DAPL. We are eager to see this undertaking get on track with all consulting parties, and for the Corps to comply with the four-step Section 106 process. Most important, we are eager to see the Corps take appropriate steps to meet its government-to-government responsibilities regarding consultation with Indian tribes consistent with the intent and spirit of the National Historic Preservation Act.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at jeddins@achp.gov.

Sincerely,

Reid J. Nelson
Director
Office of Federal Agency Programs

ATTACHMENT 11

EXHIBIT 29

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
OAHE PROJECT
28563 POWERHOUSE ROAD
PIERRE SD 57501-6174

RECEIVED
Apr 25, 2016
AWB
SRST - THPO

REPLY TO
ATTENTION OF:

April 22, 2016

Field Archeologists

COPY

Ms. Fern Swenson
Deputy State Historic Preservation Officer
North Dakota Historical Society
612 East Boulevard Avenue, Heritage Center
Bismarck, North Dakota 58505-0830

Dear Ms. Swenson,

The U.S. Army Corps of Engineers, Oahe Project Office, has received a request from Dakota Access, LLC to construct a pipeline crossing of the Missouri River in association with the proposed Dakota Access Pipeline (DAPL) project. As stated in the previous informational letter (dated 7/22/15), the proposed crossing is located in Section 10, Township 134 N, Range 79 West, Morton County and Section 11, Emmons County, North Dakota.

Project Description

The proposed activity will involve horizontal directional drill (HDD) construction which will pass the 30" pipeline under the Missouri River at a depth of 92' at this location (see Figures 1&2). HDD construction for the Lake Oahe crossing will consist of an approximate 7500' bore with the excavation of two bore pits, approximately 10' deep; one entry (Morton County) and one exit (Emmons County).

The following text from the Dakota Access cultural resources survey report describes the HDD process:

> *An HDD crossing involves drilling a hole under the water body and installing a pre-fabricated pipe segment through the hole. The first step in an HDD is to drill a small diameter pilot hole from one side of the crossing to the other using a drill rig. As the pilot-hole progresses, segments of drill pipe are inserted into the hole to extend the length of the drill. The drill bit is steered and monitored throughout the process until the desired pilot hole had been completed. The pilot hole is then enlarged using several passes of successively larger reaming tools. Once reamed to a sufficient size, a pre-fabricated segment of pipe is attached to the drill string on the exit side of the hole and pulled back through the drill hole toward the drill rig. Depending on the substrate, drilling and pull back can last anywhere from a few days to a few weeks.* (Landt & McCord, 2016)

Pipe will be placed along a designated "stringing area" on the entry, or Morton County side of the project, prior to installation (see Figures 1, 3&5). The following description, also from the Dakota Access cultural resources survey report, discusses the pipe stringing process:

> *The pipeline stringing operation associated with the HDD at Lake Oahe will require additional temporary workspace (ATWS) on the west side of Lake Oahe for assembly of the pipeline prior to the insertion of the fabricated pipeline segment through the hole prepared by the HDD. Mechanical side booms will be used to pick up each pipeline segment and align it with the previous segment to facilitate welding. The assembled pipeline will be suspended from temporary wooden structures that typically range from three to four feet above the ground surface. The stringing operation will generally conform to the ground surface and no trenching would occur within the pipe stringing ATWS, but minor grading and the removal of vegetation activities may be required to facilitate a safe and stable work area.* (Landt & McCord, 2016)

Area of Potential Effect (APE)

HDD construction at the Lake Oahe crossing will be confined to privately owned lands outside of federal property managed by the U.S. Army Corps of Engineers, Oahe Project. No construction activities will take place on federal lands as part of this crossing (see Figures 3&4). However, since the action of placing a pipeline under federal lands is a permitted activity, the HDD construction is considered a federal undertaking and thus subject to the terms of the Missouri River Programmatic Agreement and Section 106. Any construction activity related to the HDD installation is considered as part of this undertaking, regardless of land ownership. Hence, all bore pits, stringing areas, staging/temporary work areas and access routes, even though located outside the corps boundary, are subject to review as part of this action. The APE for this project will **not** include construction for any portion of the pipeline alignment that extends past the bore pit locations (with the exception of those portions of the alignment identified as access routes or staging/temporary work areas).

Potential ground disturbances for this construction activity are as follows:

- Entry and Exit Bore Pits; excavation to a depth of approximately 10' using excavators and other heavy construction equipment (see Figures 6&7).
- HDD bore and pipe installation under the Missouri River (see Figures 1-4); the following information regarding the potential effect of vibration on sites or features in the vicinity of the bore is from the draft Environmental Assessment produced by Dakota Access (2015).

> *The impacts attributable to the HDD would not be significant. Vibrations produced during the HDD process are not of a magnitude that would cause any impacts to geologic features or other resources. Any vibrations associated with the drilling process would be limited to the immediate vicinity of the drilling equipment on the surface and downhole. The vibrations produced from the downhole tooling are of a very low magnitude and are*

attenuated very quickly by the formation such that vibrations are not felt at the surface. A vibration monitoring analysis conducted by GeoEngineers in 2009 found that peak particle velocities were less than 0.07 inches/second within approximately 50 feet of HDD operations. These velocities are well below that which would cause any structural impacts and moreover, the recorded vibrations were, in fact, imperceptible to human senses (GeoEngineers, 2009).

- Stringing Areas, Access Routes; minimal surface disturbances from 0-3", mostly due to passage of vehicles and construction equipment necessary for "stringing" and assembling the pipe. A few discreet areas along the route may exceed 12" or more as needed to make the route passable and set up the wooden pipe cradles across the rougher sections of terrain (see Figures 3&5).
- Construction access on the Morton County side will follow the established stringing area in from Highway 1806 (see map). Construction access to the Emmons County construction area will follow the pipeline ROW in from Highway 1804 (see Figures 3-5).
- Temporary Work Areas; used for temporary stockpiling of pipe and equipment; minimal surface disturbances of 0-3". These areas are adjacent to the bore pit and stringing area locations (see Figures 5&6).

Cultural Resource Identification

A review of USACE and NDSHPO cultural files and associated cultural resource reports indicated five recorded cultural sites within the project APE (see Figures 3-7).

Site Number	**Site Name**	**Site Type**	**NR Status**
32MO0060*	Thomas Short Site	Historic Farmstead	Unevaluated
32MOX0570		Isolated Lithic Flake	Not Eligible
32MOX0004**		Artifact Scatter	Unevaluated
32EM0021*	Wounded Knee Site	Artifact Scatter	Unevaluated
32EM0221**	Gayton Post Office/Store	Historic Post Office	Unevaluated

* These sites are included in the project APE due to their position in relation to the project corridor. They are not in the construction zone due to HDD passing the pipeline well beneath any potential cultural strata.

** These sites are included in the project APE primarily due to the size of the old legal locations (1/4 section or larger) as originally recorded. The actual site locations are not accurately known, but no evidence of them has been found within the APE. For example, 32MOX0004 is a location based on some sort of questionnaire from the 1930's which reported a prehistoric artifact scatter somewhere in that general area. Since it has never been relocated, the original, large scale location remains in the records. In the case of 32EM0221, no updated location has been reported since the original site location was made.

The following sites are recorded OUTSIDE the project area, but within a one-mile radius (see Figure 1).

Site Number	Site Name	Site Type	NR Status
32MO0257		Stone Circle/ Cairn	Unevaluated
32MO0258		Prehistoric Artifact Scatter	Unevaluated
32MO0256	Busia Site	Stone Circle/ Cairn	Unevaluated
32MOX0177		Prehistoric Isolated Find	Not Eligible
32MO0082		Stone Circle	Unevaluated
32MOX0179		Prehistoric Isolated Find	Not Eligible
32MO0259	Cannonball Ridge	Prehistoric Artifact Scatter	Unevaluated
32MO00130		Prehistoric Artifact Scatter	Not Eligible
32MO1098		Historic Roadbed	Unevaluated
32MOX0006	Cannonball Post Office	Historic Site Lead	Unevaluated
32MO01081		Historic Artifact Scatter	Unevaluated
32MOX0401		Isolated Artifact Scatter	Not Eligible
32MOX0176		Isolated Artifact Scatter	Not Eligible
New Site NDMO1 *New site, has not yet been filed with NDSHPO	Galpin Cemetery	Cemetery/Burial	Unevaluated
32MOX0180		Isolated Artifact Scatter	Not Eligible
32MOX0181		Isolated Artifact Scatter	Not Eligible

Site Number	Site Name	Site Type	NR Status
32MO0001	Cannonball Village	Prehistoric Village	Unevaluated
32MO0054	Donahue Homestead	Historic Homestead	Unevaluated
32MO0061		Prehistoric Artifact Scatter	Unevaluated
32EMX0159		Burial	Unevaluated
32EM0133		Historic Homestead	Unevaluated
32EM0094		Prehistoric Artifact Scatter	Unevaluated
32EMX0071		Prehistoric Isolated Find	Not Eligible
32EMX0072		Prehistoric Isolated Find	Not Eligible
32EM0019		Prehistoric Artifact Scatter	Unevaluated
32EMX1429		Isolated Artifact Scatter	Not Eligible
32EM0172		Historic Foundation	Unevaluated
32EMX0059		Prehistoric Site Lead	Unevaluated
32EMX0060	Fort Bouis Fur Post	Historic Site Lead	Unevaluated
32EMX1413		Isolated Artifact Scatter	Not Eligible
32EMX1414		Isolated Artifact Scatter	Not Eligible
32EM0020		Prehistoric Artifact Scatter	Unevaluated
32EMX1389		Prehistoric Site Lead	Unevaluated
32EMX1442		Prehistoric Site Lead	Unevaluated
32EMX1353	School Foundation	Historic Lead	Unevaluated
32EMX1430		Prehistoric Isolated Find	Not Eligible

The APE for this project (private lands outside of USACE boundaries) was most recently surveyed by Merjent, Inc. in 2014. Subsequent versions of the resulting cultural resources survey report were produced by Merjent (Sather, et al, October 2015) and Alpine Archaeological Consultants, Inc. in coordination with Gray & Pape, Inc. (Landt & McCord, March 2016). Survey coverage for this effort included a 100' wide corridor along the stringing area and a 400' wide corridor for the remainder of the project area (see Figures 3&4). One new cultural site was recorded during a shovel test, 32MOx00570. This find consisted of a single lithic flake. Eight subsurface shovel tests, each approximately 30 cm diameter, at and surrounding the find, were all negative. Merjent recommended a "Not Eligible" determination for this site. No previously recorded sites were found to be within the survey corridor associated with this action. Based on this information and the fact that all surface construction activity is planned to occur outside of USACE managed lands, Merjent recommended a finding of "No Historic Properties Subject to Effect".

USACE managed lands within the project area were most recently surveyed by SWCA Environmental Consultants in 2009. No new, or previously recorded cultural sites were found/relocated within the project area during this survey (Slessman 2010). The area was also surveyed by Larson-Tibesar & Associates in 1983 (east side) and 1984 (west side) (Larson 1986 & 1987, respectively). This was the first and most comprehensive survey of USACE lands; most of the sites in this area were identified and recorded during this survey.

The University of North Dakota (UND) also conducted surveys here in the 1980-83 timeframe associated with the Northern Border Pipeline (NBP) (Root & Gregg, 1983). Since the proposed DAPL project is planned to closely parallel the Northern Border line at the crossing, the UND work is particularly important and useful for this project review. UND conducted an initial pedestrian survey of the NBP ROW and then returned to selected sites (those that they felt may have been eligible) to conduct testing and evaluation. Among those sites evaluated were the Donahue-Leach Homestead Site (32MO0054), Thomas Short Site (32EM0060), 32MO0061 and the Wounded Knee Site (32EM0021).

The Wounded Knee site (not to be confused with the massacre site of the same name), 32EM0021 received a fair degree of testing by UND in 1981 as part of the NBP project. The site boundaries (both horizontal and vertical) were well defined by a series of one hundred and ten, 7" diameter auger tests (to 90cmbs), five excavation units (two 1x1m and three 2x2m) and four bank profiles (2m long). Bank profiles were extended down to a depth of 250cmbs. As a result of this work, Woodland period components were identified in strata ranging from 40cmbs down to a maximum depth of 90cmbs. Artifacts representing later occupations were also recovered in the 0-30cmbs range. While most, if not all of the upper component of this site has been impacted by cultivation and construction of the NBP, a portion of the site containing elements of the woodland occupation remains undisturbed on southern end of the site area. UND has recommended this remnant of 32EM0021 as eligible for listing on the National Register of Historic Places (NRHP).

Site 32EM0019 is a prehistoric artifact scatter located north of site 32EM0021 and outside of the project APE on the east side of the river (see Figure 6). UND found this site to have no remaining subsurface context due to cultivation. No additional testing took place on this site. Neither 32EM0019 nor 32EM0021 were relocated during the recent SWCA survey. 32EM0019 is currently listed as "unevaluated".

In the Management Summary for the NBP work, author Matthew Root stated, "Those portions of sites within easements are assumed to have been substantially impacted, or completely destroyed unless documented otherwise" (1983). This seems to definitely be the case with site 32MO0061 which was directly in the NBP route on the west side. 32MO0054 was heavily impacted, although there is evidence that some portion of this site remains, just outside of the easement ROW (see Figure 7). UND recommended that the historic sites (32MO0054 and 60) were eligible for listing based on their association with the Cannonball Ranch. No official determination of eligibility has been made for these sites. As a result, they are both currently listed as "unevaluated".

Section 106 Consultation

Solicitation for consultation and comment for the DAPL Oahe Crossing Project was initiated in an information letter dated 22 July, 2015. During the following comment period, the Oahe Project Office received formal response letters from the Cheyenne River Sioux THPO, Steven Vance (17 August, 2015), SRST THPO, Waste Win Young (21 August, 2015) and NDSHPO, Claudia Berg (28 August, 2015).

Mr. Vance expressed his support of SRST in regards to the project and commented in support of earlier concerns voiced by SRST, such as the lack of tribal participation in identification efforts and the potential for disturbing burials. He also recommended that we offer the opportunity for tribal visits to the project area.

SRST comments addressed the potential for the project to impact a number of sites; 32MOX0570, 32MOX0004, 32MO0259, 32EM0221, 32EM0019, 32EM0021 and questioned the eligibility listings for a number of others. SRST also requested tribal monitoring of all work and specifically that construction monitoring was necessary for both 32MO0259 and 32EM0021. They also recommended a "full TCP and archaeological Class III Cultural Resource survey" (Young, 2015).

NDSHPO indicated their desire to consult and reiterated an earlier statement (regarding the DAPL survey report) deferring concurrence on site eligibility and determination of effect. They also had concerns with potential effects to sites near the project APE.

In addition to those comments received in response to Section 106 consultation, many other comments were submitted to USACE as part of the Environmental Assessment for this project and in response to the Regulatory actions associated with the rest of the pipeline project. While some of these comments overlapped those made in direct response to the cultural resources review, the majority concerned larger issues, often related to the pipeline project as a whole and were beyond the scope of the Oahe crossing action. As such, these comments are not addressed in this effort.

In order to address a number of comments firsthand, on-site visits to the project APE were arranged with cultural resource personnel from the offices of the North Dakota State Historic Preservation Office (NDSHPO) and the Standing Rock Sioux Tribe (SRST). Oahe Project archaeologists conducted a site visit with NDSHPO on 9/28/15. The APE on both sides of the river was inspected. No cultural materials were observed during the visit and all previous comments/questions from NDSHPO were resolved (Putz-Maier, personal communication 4/18/2016).

Site visits were conducted with cultural resources personnel from the SRST on 3/7/16 (west side) and 3/22/16 (east side). During the March 7th visit, the group relocated two nearby sites (32MO0054 and 32MO0001) and also visited a historic cemetery (Galpin) near the site of the historic Cannonball Ranch. After this visit, the SRST provided this office with information regarding areas/sites in the vicinity of the project that they had recorded (Brave Bull Allard, 2016). All of the sites mentioned in this report are located outside of the planned areas of disturbance for this project.

During the March 22nd visit to the east side of the project, a large glacial erratic was identified as an item of cultural importance. This large boulder is located outside of the temporary work space and any area of disturbance. A Knife River Flint (KRF) flake, Tongue River Silicified Sediment (TRSS) core and fire cracked rock (FCR) fragments were also found near the current boundaries of recorded site 32EM0021. These items were within the portion of the site previously destroyed by the NBP and below the planned area of disturbance for the DAPL bore pit. A single KRF knife fragment was also found in a separate location outside of the planned ROW (see Figure 6).

Determination of Effect

During the intervening space of time since the beginning of the informational comment period on July 22, 2015, numerous phone calls, emails, meetings and site visits to the project area have taken place. While not all of the existing issues with the DAPL project have been solved, many of the questions regarding specific issues that apply to cultural resource impacts within the APE and scope of this crossing project have been addressed. Site location/condition and APE questions have been clarified and discussed during the aforementioned site visits and additional information was collected and analyzed. Recent and historic survey data and findings were examined and discussed as well. The fact that all of the USACE managed lands will avoid impacts due to the use of HDD is a major contributing factor to this determination of effect. The comprehensive nature of the NBP/UND effort, along with supporting information from later surveys, works in combination with the basically unchanged nature of the terrain in the crossing area to lend a high degree of confidence to both, the location of sites as recorded and the lack of undiscovered sites nearby.

As a result, we concur with the findings and recommendations of the Dakota Access/Oahe Crossing cultural resource survey report in regards to site **32MOx0570** (Landt & McChord, final version, March 2016); this site is determined "**Not Eligible**" for listing on the National Register of Historic Places. We also concur with the recommendation of "**No Historic Properties Subject to Effect**" for the actions associated with the Oahe crossing of the Dakota Access Pipeline.

However, given the proximity of a number of these sites to HDD construction areas on both sides of the river, this office will require notification prior to the start of ground disturbing actions associated with this permit. Sufficient lead time of at least five (5) business days will be required in order to schedule personnel so that archeological monitoring of activities may take place.

With this being the case, we anticipate your concurrence with our "Not Eligible" and "No Historic Properties Affected" determinations. Please respond in writing within 30 days receipt of this letter. If you have additional comments or concerns with this project, please contact me at (605) 945-3406 or via email at richard.d.harnois@usace.army.mil

Sincerely,

Richard D. Harnois
Sr. Field Archaeologist
U.S. Army Corps of Engineers,
Oahe Project

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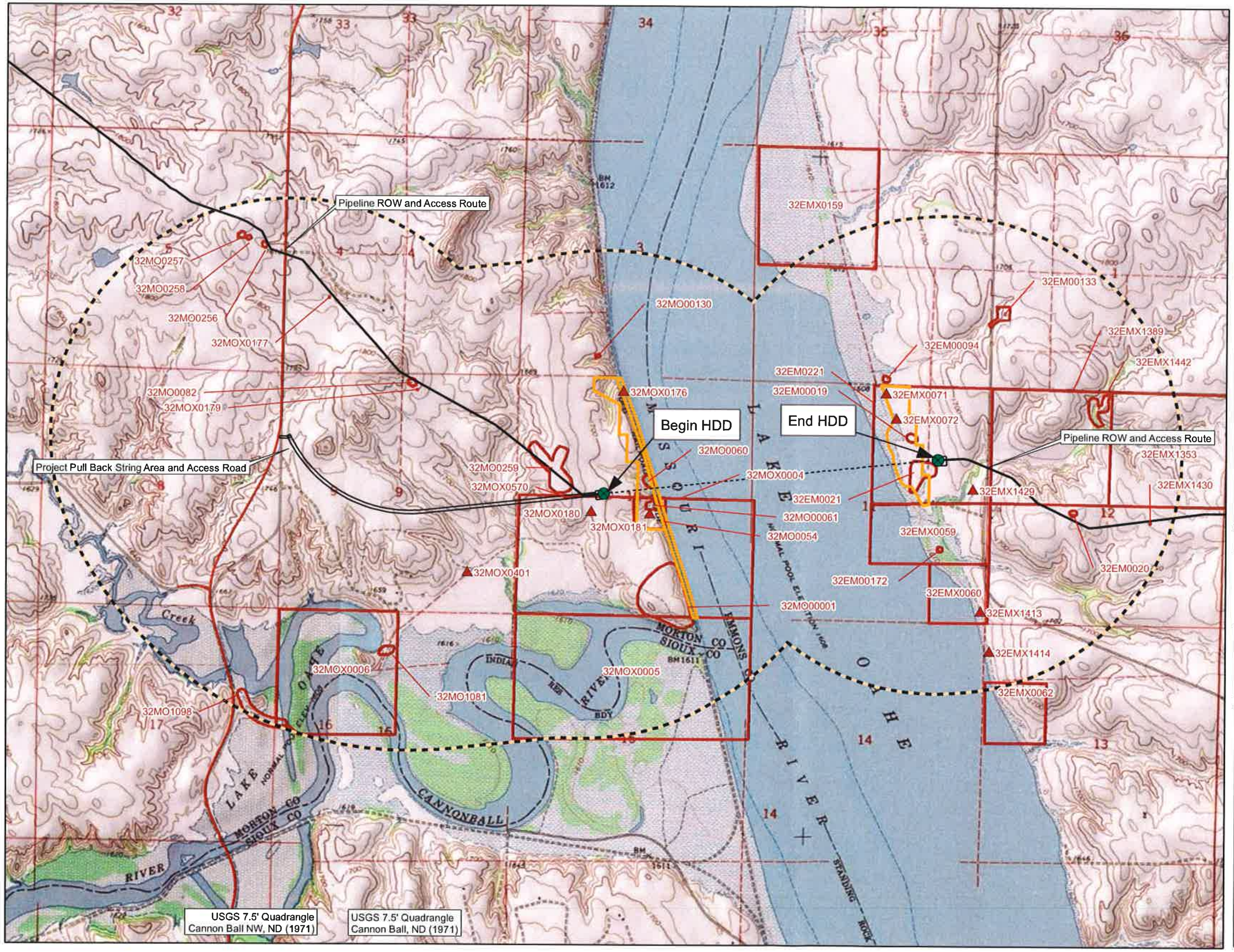
Enclosures:

Figure 1. Project Area Overview Topo Map with 1-mile cultural resource radius.
Figure 2. Project Area Aerial Map with cultural resources.
Figure 3. Project Area Aerial Map, West side detail.
Figure 4. Project Area Aerial Map, East side detail.
Figure 5. Project Area Aerial Map, West side APE detail.
Figure 6. Project Area Aerial Map, East side APE detail.
Figure 7. Project Area Aerial Map, West side APE detail, large scale.
Figure 8. General Project Location Map.

Figure 1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32MO00130
32MO0082
32MOX0179
32MOX0176
Begin HDD
End HDD
Project Pull Back String Area and Access Road
32MO0259
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32MOX0180
32MOX0181
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32MO00061
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32EMX0159
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Pipeline ROW and Access Route
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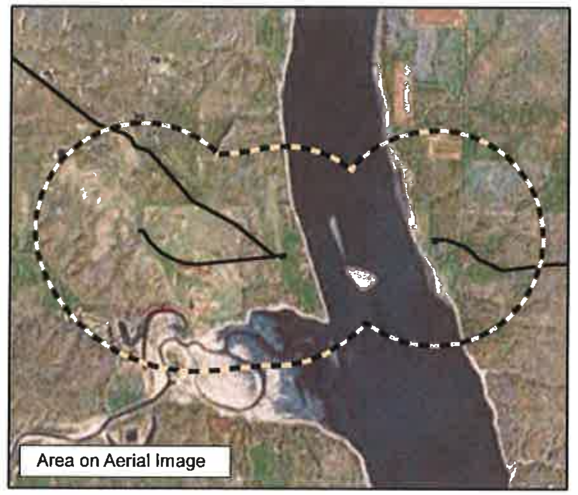
32EMX1430
32EMX0059
32EM00020
32EMX0060
32EMX1413
32EMX1414
32EMX0062
LAKE OAHE
MISSOURI RIVER
CANNONBALL
MORTON CO
SIOUX CO
USGS 7.5' Quadrangle
Cannon Ball NW, ND (1971)
USGS 7.5' Quadrangle
Cannon Ball, ND (1971)


Area on Aerial Image

LEGEND
- Action/Connected Action Area 1-mile Buffer *
- DAPL Centerline
- Project Workspace
- Bore Pit Location
- HDD Crossing
- USACE Managed Lands

Resources within 1 Mile
- Isolated Find Location
- Site Location

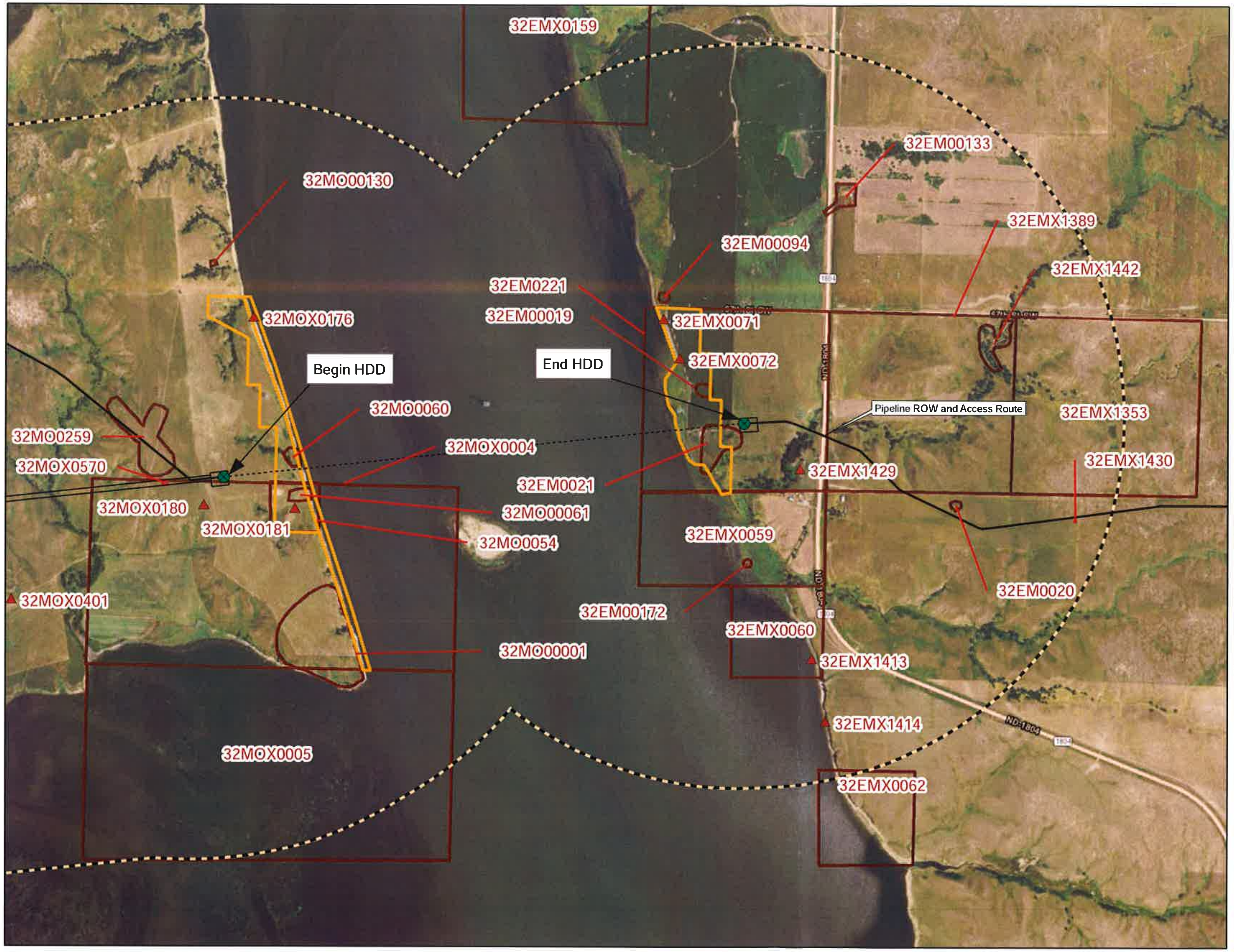
* Action/Connected Action Area illustrated on companion detail figures.

0 500 1000 Meters
0 1500 3000 Feet

DAPL Pipeline Project
Resources within 1 Mile,
Lake Oahe Crossing

DAKOTA ACCESS, LLC

Figure 2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Begin HDD
End HDD
32MO0060
Pipeline ROW and Access Route
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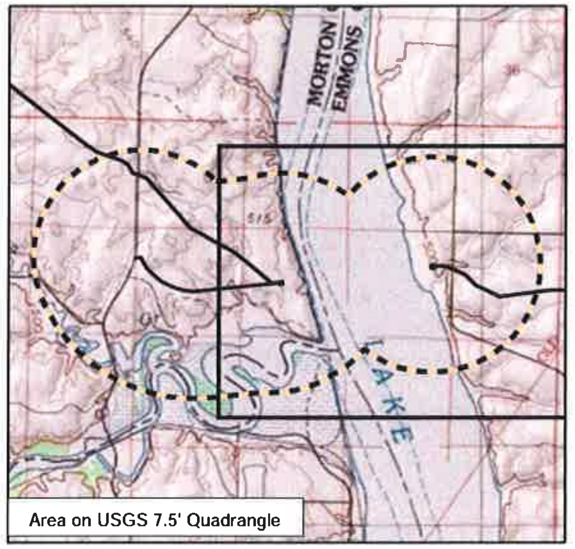

MORTON
EMMONS
Area on USGS 7.5' Quadrangle

LEGEND

- Action/Connected Action Area 1-mile Buffer
- DAPL Centerline
- Project Workspace
- Bore Pit Location
- HDD Crosssing
- USACE Managed Lands

Resources within 1 mile

- Isolated Find Location
- Site Location

0 250 500 Meters

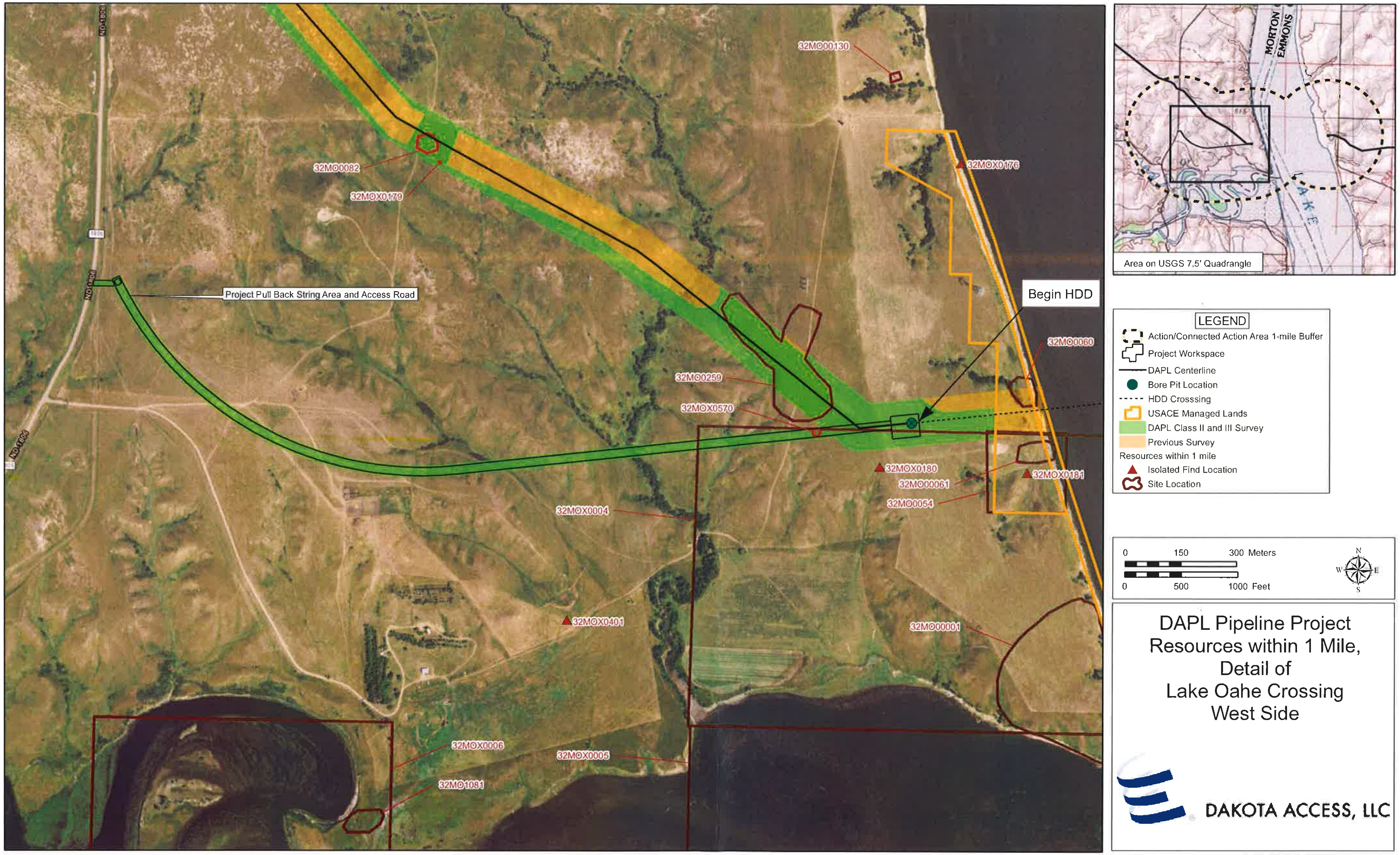
0 1000 2000 Feet

N W E S

DAPL Pipeline Project
Resources within 1 Mile,
Detail of
Lake Oahe Crossing

DAKOTA ACCESS, LLC

Figure 3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32MOX0179
32MOX0176
Project Pull Back String Area and Access Road
Begin HDD
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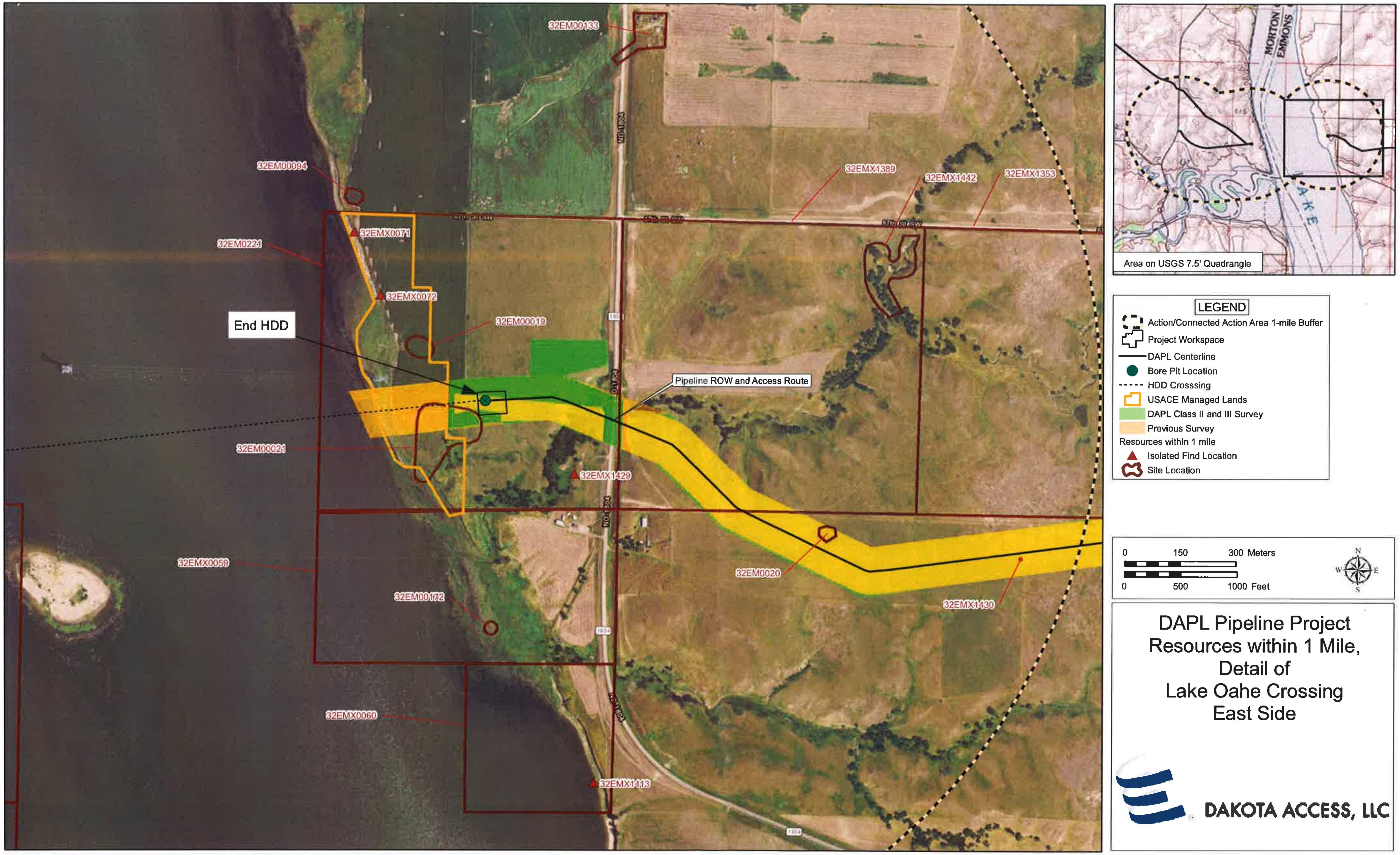
32MO0054
32MOX0181
32MOX0004
32MOX0401
32MO00001
32MOX0006
32MOX0005
32MO1081
MORTON
EMMONS
Area on USGS 7.5' Quadrangle
LEGEND
Action/Connected Action Area 1-mile Buffer
Project Workspace
DAPL Centerline
Bore Pit Location
HDD Crossing
USACE Managed Lands
DAPL Class II and III Survey
Previous Survey
Resources within 1 mile
Isolated Find Location
Site Location
0 150 300 Meters
0 500 1000 Feet
DAPL Pipeline Project
Resources within 1 Mile,
Detail of
Lake Oahe Crossing
West Side
DAKOTA ACCESS, LLC

Figure 4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End HDD
Pipeline ROW and Access Route
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32EMX1442
32EMX1353
32EM00021
32EMX1429
32EMX0059
32EM00172
32EM0020
32EMX1430
32EMX0060
32EMX1413
MORTON
EMMONS
Area on USGS 7.5' Quadrangle
LEGEND
Action/Connected Action Area 1-mile Buffer
Project Workspace
DAPL Centerline
Bore Pit Location
HDD Crosssing
USACE Managed Lands
DAPL Class II and III Survey
Previous Survey
Resources within 1 mile
Isolated Find Location
Site Location
0 150 300 Meters
0 500 1000 Feet

DAPL Pipeline Project
Resources within 1 Mile,
Detail of
Lake Oahe Crossing
East Side

DAKOTA ACCESS, LLC

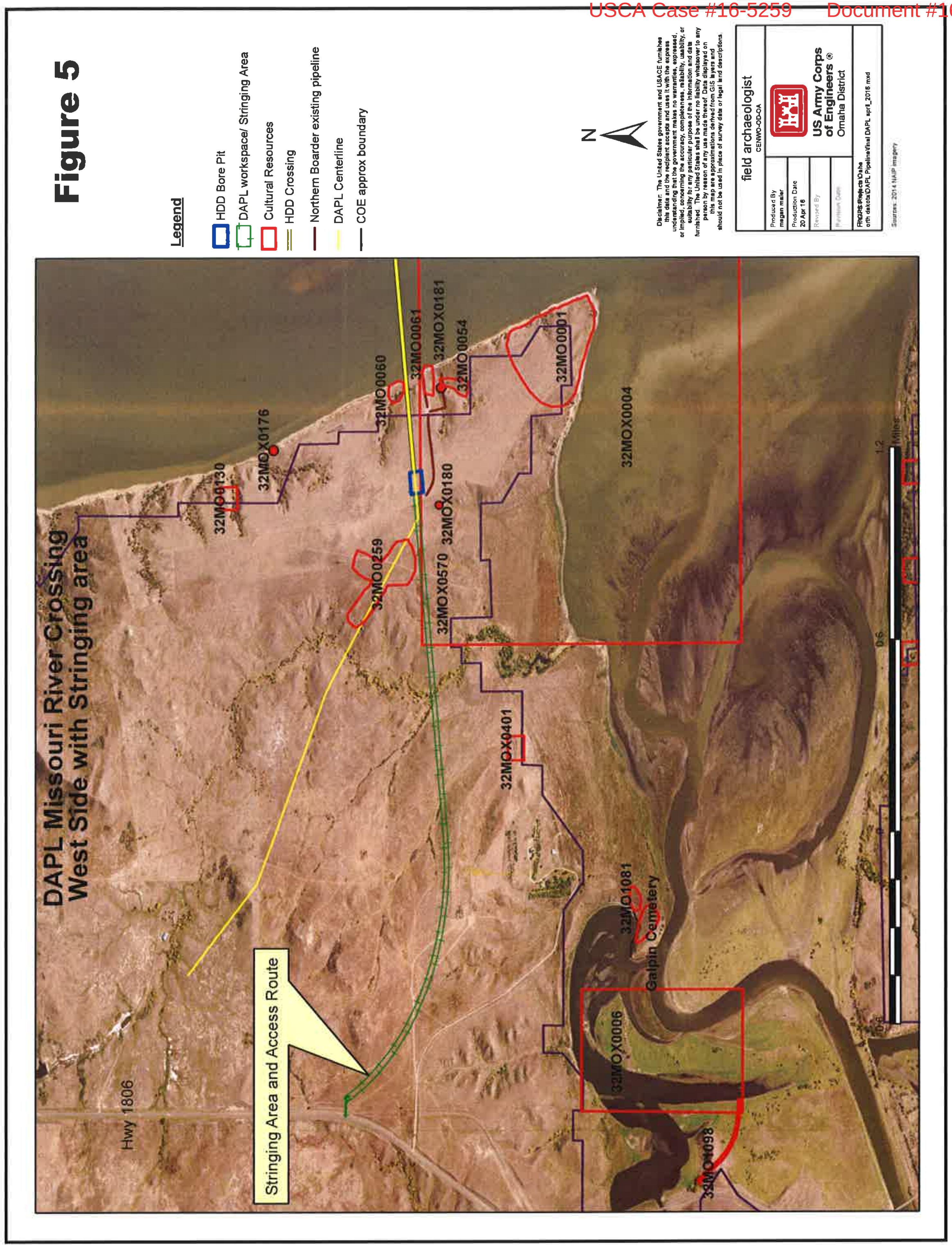


Figure 5
DAPL Missouri River Crossing
West Side with Stringing area
Legend
HDD Bore Pit
DAPL workspace/ Stringing Area
Cultural Resources
HDD Crossing
Northern Boarder existing pipeline
DAPL Centerline
COE approx boundary
N
field archaeologist
US Army Corps of Engineers
Omaha District
Sources: 2014 NAIP imagery
32MO0130
32MOX0176
32MO0060
32MO0061
32MOX0181
32MO0054
32MO0001
32MOX0004
32MOX0180
32MOX0570
32MO0259
32MOX0401
32MO1081
Galpin Cemetery
32MOX0006
32MO1098
Stringing Area and Access Route
Hwy 1806
Miles

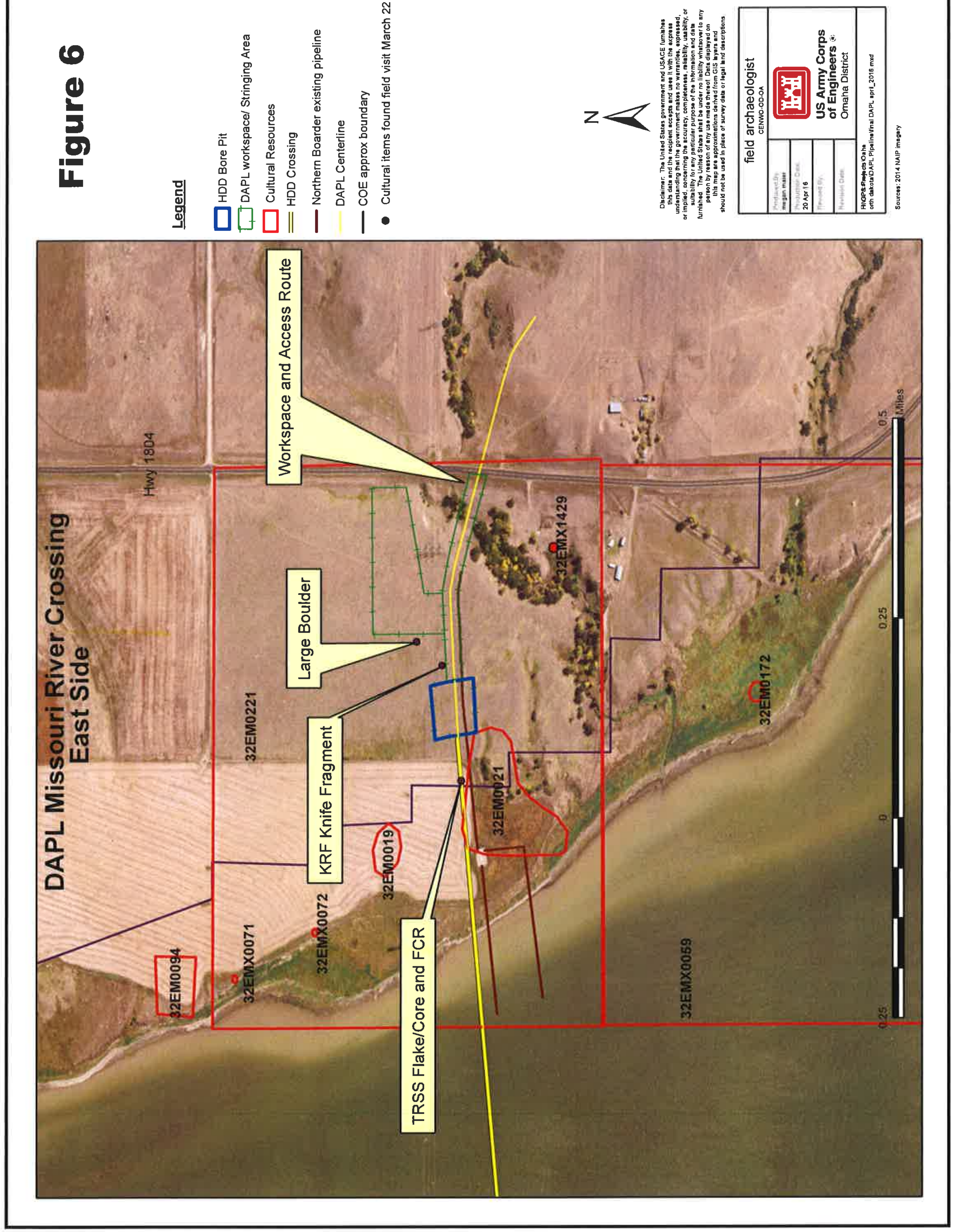


Figure 6
DAPL Missouri River Crossing
East Side
Legend
HDD Bore Pit
DAPL workspace/ Stringing Area
Cultural Resources
HDD Crossing
Northern Boarder existing pipeline
DAPL Centerline
COE approx boundary
Cultural items found field visit March 22
N
field archaeologist
CENWO-OD-OA
US Army Corps of Engineers
Omaha District
Sources: 2014 NAIP imagery
Workspace and Access Route
Large Boulder
KRF Knife Fragment
TRSS Flake/Core and FCR
Hwy 1804
32EM0221
32EMX1429
32EM0172
32EM0021
32EM0019
32EMX0072
32EMX0071
32EM0094
32EMX0059
0.25
0
0.25
0.5
Miles

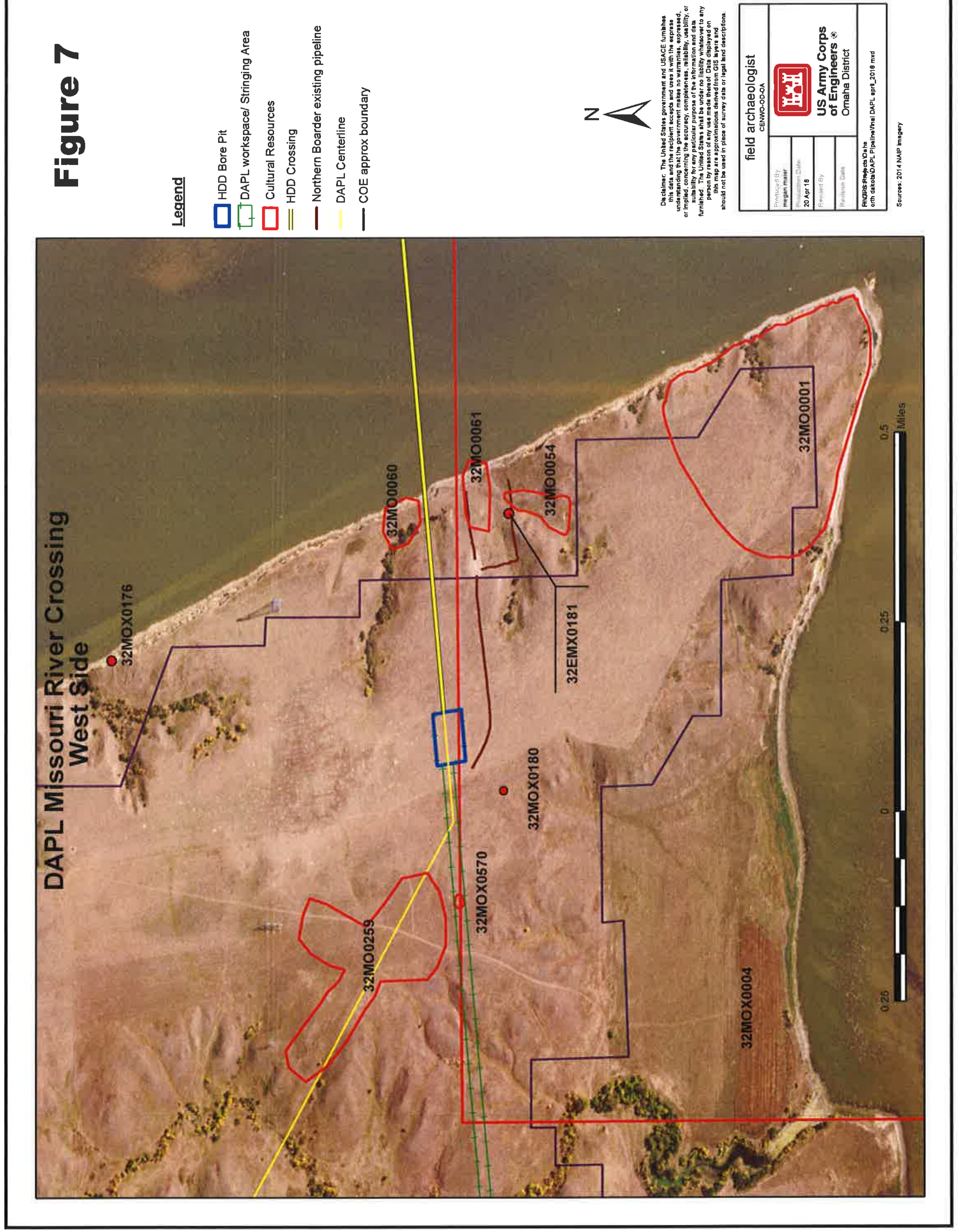
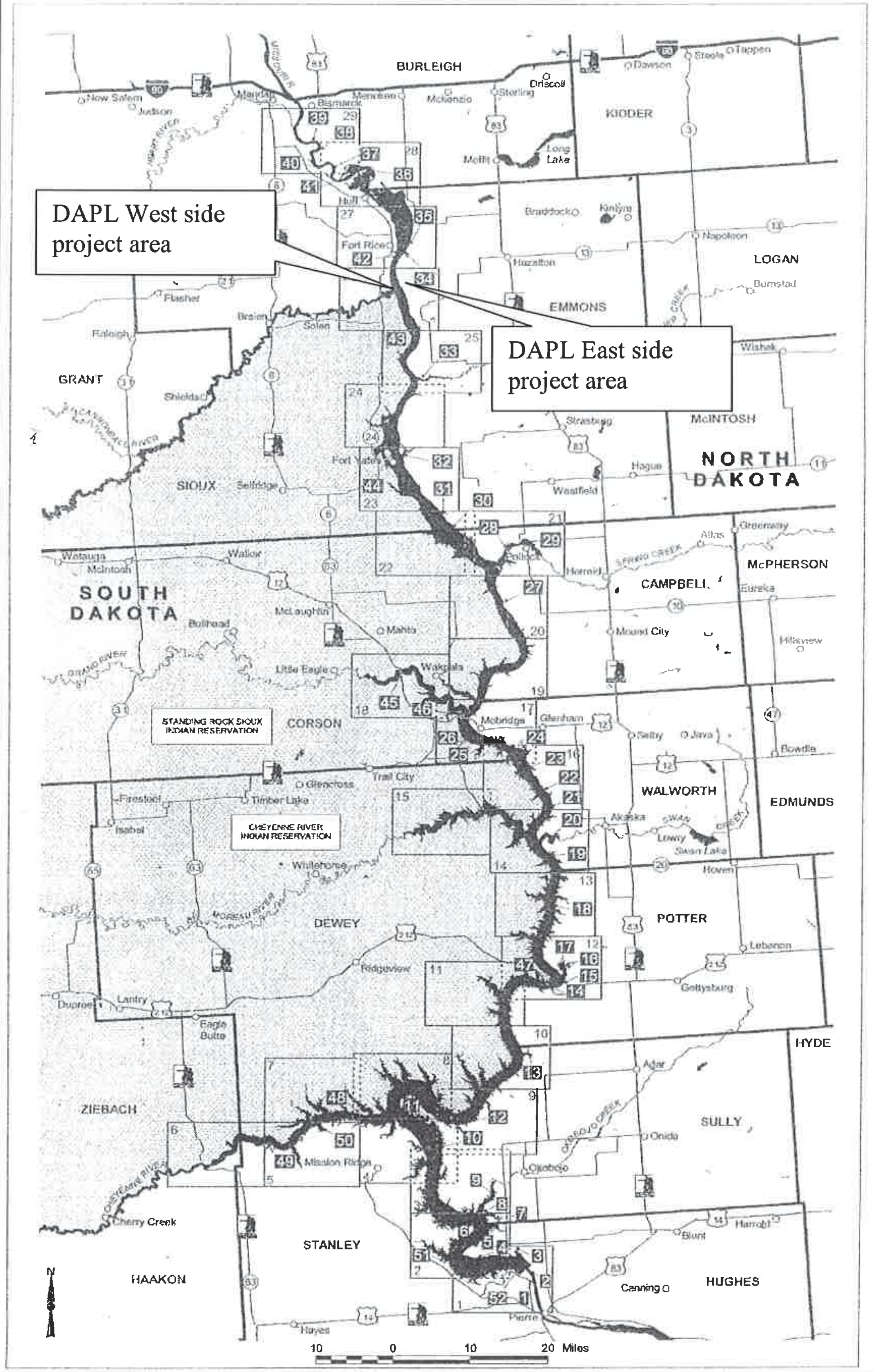


Figure 7
DAPL Missouri River Crossing
West Side
Legend
HDD Bore Pit
DAPL workspace/ Stringing Area
Cultural Resources
HDD Crossing
Northern Boarder existing pipeline
DAPL Centerline
COE approx boundary
N
field archaeologist
US Army Corps of Engineers
Omaha District
Sources: 2014 NAIP Imagery
Miles
0.25
0
0.25
0.5
32MOX0176
32MO0060
32MO0061
32MO0054
32MO0001
32EMX0181
32MOX0180
32MOX0570
32MO0259
32MOX0004

General Project Location

Lake Oahe - Sheet Index Map


DAPL West side project area
DAPL East side project area
BURLEIGH
KIDDER
LOGAN
EMMONS
McINTOSH
NORTH DAKOTA
GRANT
SIOUX
McPHERSON
CAMPBELL
SOUTH DAKOTA
CORSON
STANDING ROCK SIOUX INDIAN RESERVATION
WALWORTH
EDMUNDS
CHEYENNE RIVER INDIAN RESERVATION
DEWEY
POTTER
HYDE
ZIEBACH
SULLY
STANLEY
HAAKON
HUGHES
Bismarck
Mandan
Fort Yates
Mobridge
Pierre
10 0 10 20 Miles

Operations/Regulatory GIS Unit
2003 Lake Oahe Boating and Recreation Guide. U.S. Army Corps of Engineers, Omaha District, Omaha.

PROGRAMMATIC AGREEMENT FOR THE OPERATIONS AND MANAGEMENT OF THE MISSOUR RIVER MAINSTEM SYSTEM

Excel sheet updated March 11, 2016 (Price)

Count	P	S	Last Name	Organization	Prefix	First/Middle Name	Title
1	P		Nelson	Advisory Council for Historic Preservation	Mr.	Reid	Director, Office of Federal Agency Programs
2	P		Lusher	Advisory Council for Historic Preservation	Mr.	Brian	Program Analyst
3	P		Stafne	Assiniboine and Sioux Tribes of Fort Peck	Mr.	AT "Rusty"	Chairman
4		S	Youpee	Assiniboine and Sioux Tribes of Fort Peck	Mr.	Curley	Director, Cultural Resources Department
5	P		Barnes	Blackfeet Tribe	Mr.	Harry	Chairman
6		S	Murray	Blackfeet Tribe	Mr.	John	Tribal Historic Preservation Officer
7	P		LaPointe	Bureau of Indian Affairs	Mr.	Timothy	Regional Director
8		S	Murdy	Bureau of Indian Affairs	Dr.	Carson	Regional Archaeologist
9	P		Vance	Cheyenne River Sioux Tribe	Mr.	Steven	Tribal Historic Preservation Officer
10	P		Petersen	Cheyenne River Sioux Tribe	Ms.	Donna Rae	Cultural Preservation Office
11	P		Uses the Knife	Cheyenne River Sioux Tribe	Mr.	Raymond	Tribal Council
12		S	Frazier	Cheyenne River Sioux Tribe	Mr.	Harold	Chairman
13	P		St. Marks	Chippewa Cree Tribe of the Rocky Boys' Reservation	Mr.	Ken	Acting Chairman
14	P		Zephier	Crow Creek Sioux Tribe	Mr.	Darrell	Tribal Historic Preservation Officer
15		S	Sazue	Crow Creek Sioux Tribe	Ms.	Roxanne	Chairperson
16		S	Pease	Crow Creek Sioux Tribe	Mr.	Leonard	Vice Chairman
17	P		Old Coyote	Crow Nation	Mr.	Darin	Chairman
18		S	Bull Chief	Crow Nation	Mr.	Emmerson	Tribal Historic Preservation Officer
19	P		St. Claire, Jr.	Eastern Shoshone Tribe	Mr.	Darwin	Chairman
20	P		Reider	Flandreau Santee Sioux Tribe	Mr.	Anthony	President
21		S	Kills A Hundred	Flandreau Santee Sioux Tribe	Mr.	Garrie	Tribal Historic Preservation Officer
22	P		Azure	Fort Belknap Indian Community Gros Ventre and Assiniboine Tribes	Mr.	Mark F.	President
23	P		Wright	Lower Brule Sioux Tribe	Mr.	Kevin	Chairman
24	P		Jones	Lower Brule Sioux Tribe	Mr.	Scott	Cultural Preservation Office
25		S	Green	Lower Brule Sioux Tribe	Ms.	Clair S.	Public Relations/Cultural Preservatation Office
26	P		Crows Breast	Mandan, Hidatsa & Arikara Nation	Mr.	Elgin	Tribal Historic Preservation Officer
27		S	Fox	Mandan, Hidatsa & Arikara Nation	Mr.	Mark	Chairman
28	P		Wilmoth	Montana State Historic Preservation Office	Dr.	Stan	State Archeologist
29		S	Baumler	Montana State Historic Preservation Office	Dr.	Mark F.	State Historic Preservation Officer
30	P		Pahl	National Trust for Historic Preservation	Ms.	Barbara	Director, Mountains/Plains Office
31	P		Geib	Nebraska State Historical Society	Mr.	Phil	State Archeologist
32		S	Smith	Nebraska State Historical Society	Mr.	Michael J.	State Historic Preservation Officer
33	P		Swenson	North Dakota Historical Society	Ms.	Fern	Deputy State Historic Preservation Officer
34		S	Berg	North Dakota Historical Society	Ms.	Claudia	State Historic Preservation Officer
35	P		Goggles	Northern Arapaho Tribe	Mr.	Dean	Chairman
36		S	Soldier Wolf	Northern Arapaho Tribe	Ms.	Yufna	Tribal Historic Preservation Officer
37	P		Limpy	Northern Cheyenne Tribe	Ms.	Teanna	Tribal Historic Preservation Officer
38		S	Fisher	Northern Cheyenne Tribe	Mr.	Levando	President
39	P		Yellowbird Steele	Oglala Sioux Tribe	Mr.	John	President
40	P		Lone Hill	Oglala Sioux Tribe	Ms.	Trina	Tribal Historic Preservation Officer
41	P		Parker	Omaha Tribe of Nebraska	Mr.	Thomas	Tribal Historic Preservation Officer
42		S	Miller	Omaha Tribe of Nebraska	Mr.	Vernon	Chairman
43	P		Teboe	Ponca Tribe of Nebraska	Mr.	Randy	Cultural Resource Director
44	P		Wright	Ponca Tribe of Nebraska	Mr.	Shannon	Tribal Historic Preservation Officer
45		S	Wright	Ponca Tribe of Nebraska	Mr.	Larry	Chairman
46	P		Kindle	Rosebud Sioux Tribe	Mr.	William	President

ATTACHMENT 12

EXHIBIT 32

Case No. 1:16-cv-1534-JEB

Preserving America's Heritage

May 19, 2016

Lieutenant General Thomas P. Bostick
Commanding General and Chief of Engineers
Headquarters
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Ref: Dakota Access Pipeline Project

Dear General Bostick:

The Advisory Council on Historic Preservation (ACHP) objects to the effect determinations made by the Corps of Engineers (Corps) for the referenced undertaking. In a letter dated April 22, 2016, and received on April 26, 2016, the Oahe Project Office of the Omaha District (Lake Oahe) made determinations of eligibility and a finding of "No Historic Properties Affected" for the Lake Oahe Project crossing location. In a letter dated May 13, 2016, the Omaha District made a finding of "No Historic Properties Affected" for ten of eleven crossings of waters of the U. S. (WOUS) subject to Department of the Army (DA) authorization under the Regulatory Program and requiring Pre-Construction Notifications (PCNs) in South Dakota. It is the ACHP's opinion that the Corps has not delineated the undertaking and Area of Potential Effects (APE) correctly and has not carried out the steps of the Section 106 process as set forth in 36 C.F.R. Part 800, "Protection of Historic Properties", the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.). Given the history of procedural problems in the way the Corps has handled Section 106 consultation for this undertaking and the decision by the Corps not to designate a single lead on behalf of the Corps, we are providing this opinion to you as the head of the agency in accordance with 36 C.F.R. § 800.4(d)(1)(iv)(A).

Accordingly, we believe that the effect findings made by the Corps are premature, based on an incomplete identification effort, which was not sufficiently informed by the knowledge and perspective of consulting parties, including federally recognized Indian tribes who ascribe religious and cultural significance to properties in the APE that may be affected. In our letters to the Corps dated February 3, March 15, and May 6, 2016, the ACHP addressed flaws in the Corps compliance with Section 106 for the Dakota Access Pipeline Project (DAPL). In the following, we reference those flaws in order to clarify the reasons for our objection to the effect findings.

Undertaking and Area of Potential Effects

As we noted in our previous letters, the Section 106 regulations define the undertaking as the larger project, portions of which may require federal authorization or assistance. The Area of Potential Effects (APE) is the area within which the larger undertaking may affect historic properties, if any may be present.

In this case, the undertaking consists of construction of a 1,168-mile crude oil pipeline that will originate in the Bakken and Three Forks production areas of North Dakota, extend through South Dakota and Iowa, and terminate near Patoka, Illinois. The APE for the undertaking should include all areas where historic properties may be affected by the undertaking, directly and indirectly, if any are present.

Corps Regulatory in three districts (Omaha, Rock Island, and St. Louis) and a Corps Civil Works facility (Lake Oahe) have actions related to the undertaking. The pipeline crosses navigable waters at the Missouri, James, Big Sioux, Des Moines, Mississippi, and Illinois Rivers. It crosses the Missouri River twice. The pipeline right-of-way (ROW) includes 209 crossings of Waters of the United States (WOUS) that trigger PCNs and unnumbered crossings of the WOUS that do not. These are spread throughout the undertaking, and subject to the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act (33 U.S.C. 401 et seq.) and Section 404 of the Clean Water Act (33 U.S.C. 1344). The Corps also must carry out a review under Section 408 for the West Levee portion of the Illinois River.

The Corps is treating the reviews of each of the water crossings and each of its other actions as separate undertakings. The Corps is not differentiating appropriately between federal action and the undertaking, as defined in the Section 106 regulations. Further, its minimization of its responsibility to take into account the effects of the larger undertaking on historic properties has resulted in a failure to carry out appropriately the four-step Section 106 process for this undertaking in a consistent and proper sequence, and in consultation with the consulting parties. The ACHP has acknowledged that at times, a federal agency may have limited jurisdiction over a small portion of a larger undertaking. However, in such a case, the federal agency remains responsible for considering effects of the larger undertaking on historic properties beyond areas of its specific jurisdiction. Given the sheer number of water crossings and the unlikelihood that the pipeline could be constructed "but for" the issuance of these numerous permits, we cannot agree with the Corps that its responsibilities to assess effects to historic properties from the broader undertaking are limited only to the 209 PCN crossings.

The Corps should also consider the overall level of federal involvement in and relationship to this undertaking. The Fish and Wildlife Service (FWS) is considering Special Use Permits (SUPs) to allow DAPL to cross five FWS wetland easements and one grassland easement in North Dakota and 109 wetland and three grassland easements in South Dakota. The Farm Service Agency (FSA) may also be considering actions related to the undertaking. Together, the involvement of the Corps, FWS, and the FSA provides the basis for the federal agencies to consider further their obligation to take into account the affects of the larger undertaking on historic properties. Further, the coordination of the federal agencies should result in a more comprehensive approach to complying with the requirements of Section 106.

Tribal Consultation and Incomplete Identification Effort

As we noted in our letter of May 6, 2016, the ACHP is concerned that the Corps' focus on individual PCN crossings as separate undertakings, and the segmented oversight by three Corps districts and a Corps Civil Works facility has resulted in disjointed and inadequate consultation with Indian tribes who may ascribe religious and cultural significance to historic properties that may be affected by the undertaking. The Corps does not appear to have consulted with tribes in the development of the scope of the effort to identify and evaluate historic properties that may be affected by the undertaking. Based on the documentation available to us, the Corps does not appear to have adequately consulted with the tribes regarding the identification and assessment of eligibility and effects on properties of religious and cultural significance to them that may be affected by the undertaking in PCN areas, in the vicinity of water crossings within the project ROW that the applicant assumes will not require PCNs under General Conditions 20 and 31 of the Nationwide Permit protocols, and in the larger undertaking between water crossings. Only very late in the Section 106 review did the Corps move to provide tribes with access to PCN permit areas in order that they could assist in the identification of such properties. Further, the Corps appears to have focused only on archaeological sites in PCN areas and consideration of their eligibility for inclusion on the National Register of Historic Places under Criterion D.

In a letter from the Tribal Historic Preservation Officer (THPO) of the Standing Rock Sioux Tribe (SRST) to the ACHP, dated May 2, 2016, the tribe asserts that the location of the water crossing at Lake Oahe is a ceremonial and sacred site of the Tribe. It is not clear how the Corps has considered or responded to this information. According to the tribe, the Corps has not engaged appropriately with the tribes in order to identify Traditional Cultural Properties (TCPs) such as this and other properties of religious and cultural significance to tribes and properly assessed the eligibility of and effects to such properties. The SRST letter also indicates that the Corps has suggested that it has carried out appropriate consultation as specified in the Programmatic Agreement for The Operation And Management Of The Missouri River Main Stem System. We remind the Corps that a federal agency is obligated to consult with federally recognized tribes regarding the potential presence of and effects to properties of religious and cultural significance to them regardless of whether they are signatories or concurring parties on or have participated in the development of a Section 106 agreement that may, in part, relate to a portion of the APE covered in the agreement.

Procedural Issues

In reviewing the documentation available to us, there appear to have been multiple findings regarding the presence or absence of eligible properties and findings of effect for various portions of the larger undertaking. There have been multiple sets of eligibility and effect determinations sent out by different districts, to different sets of consulting parties, that collapse steps 2 and 3 of the Section 106 review process, confuse the effect findings under 36 C.F.R. § 800.4(d) and under 36 C.F.R. § 800.5, and do not clearly trigger the consulting party review and response periods as specified in the Section 106 regulations. The Rock Island District appears to have issued partial findings regarding eligibility of properties and effects for various PCN locations under its review in Iowa and Illinois, including one in December 2015 and four in March 2016. These communications included determinations of eligibility and findings of No Historic Properties Affected, No Adverse Effect, and No Adverse Effect due to Avoidance. In a letter dated April 22, 2016, the Lake Oahe Project made a determination of No Historic Properties Affected for the crossing associated with that Civil Works facility due to reliance on horizontal directional drilling. In a letter dated May 13, 2016, the Omaha District made a determination of No Historic Properties Affected for ten of the eleven PCN crossing areas in South Dakota, noting it would use permit conditions to ensure that tribes could monitor during construction for PCN areas where they have previously been denied access.

These mixed notifications are extremely confusing to consulting parties, including us, as they segment consultation on one single undertaking into pieces that fail to adequately account for the potential effects of the broader undertaking to historic properties. A federal agency should make one effect finding under 36 C.F.R. § 800.4(d) for the entire undertaking, which communicates one of the following conclusions: 1) there are no historic properties in the APE; 2) there are historic properties in the APE but the undertaking will not affect them; or 3) the undertaking will have effects on historic properties in the APE. This determination triggers a review and response period for SHPO/THPO and consulting parties. If the federal agency determines that historic properties may be affected by the undertaking, it proceeds to assess whether any effects will be adverse pursuant to 36 C.F.R. § 800.5, in consultation with consulting parties. At the end of that review process, the federal agency makes a single determination as to whether the undertaking will adversely affect historic properties or not. As context for that determination, the federal agency should specify how/why the undertaking does, or does not, adversely effect specific historic properties so that the consulting parties can make an informed evaluation of the finding. These findings and determinations should be provided to all consulting parties who are participating in the Section 106 consultation for the larger undertaking, and they should be afforded an opportunity to express their concerns about the determinations and raise objections. Based on the documentation we have received, we are uncertain whether the Corps has received any objections to the varied findings and determinations that it has issued, and, if necessary, at what point it intends to comply with the dispute procedures set forth in the Section 106 regulations. The Corps focus on each water crossing as a separate undertaking essentially results in an artificial segmentation of the undertaking which is prohibited in the NHPA, which limits the ability of the agency and consulting parties to consider alternatives to the undertaking that may avoid or minimize effects to historic properties.

Summary of ACHP Objections to Findings of Effect

Based on the inadequacies of the tribal consultation and the limited scope for identification of historic properties that may be affected, the ACHP questions the sufficiency of the Corps' identification effort, its determinations of eligibility, and assessments of effect. The Corps' effect determinations, thus far, fail to consider the potential for effects from the larger undertaking on historic properties, including those of religious and cultural significance to Indian tribes. The Corps' identification effort did not adequately facilitate the use of tribal expertise to assist in the identification of historic properties and assessment of effects. The tribes have had extremely limited access to some PCN areas, thwarting their ability to provide input to the Corps. There does not appear to have been any coordination with tribes regarding non-PCN crossings under Corps jurisdiction, and no coordination has occurred regarding historic properties in upland areas outside Corps PCN crossing permit areas. Finally, there does not appear to have been adequate consultation with tribes about the presence of TCPs and other properties of religious and cultural significance to tribes located in or beyond the Corps' jurisdictional areas, that may be affected by the undertaking. The Corps' effect determinations also fail to adequately consider long term and cumulative effects, including reasonably foreseeable effects from oil spills.

Next Steps

Pursuant to 36 C.F.R. § 800.4(d)(1)(iv)(B) and (C) and 36 C.F.R. § 800.5(c)(3)(ii) the Corps must take into account the ACHP's comments in reaching a final decision on the findings discussed in this letter. Per our regulations, as the head of the agency, you or the agency's Senior Policy Official if you so delegate, must prepare a summary of the decision that contains the rationale for the Corps' decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the other consulting parties, including Indian tribes.

It is our recommendation that the Corps and the FWS coordinate with consulting parties to develop a comprehensive PA to address varying federal jurisdiction and authority over components of the DAPL Project, expansion and completion of an appropriate identification effort, phasing of the steps of the Section 106 process that will facilitate tribal assistance in identification of properties of concern to the tribes, and responsibility for effects to historic properties in portions of the undertaking outside FWS easements and in uplands between crossings of the WOUS under Corps jurisdiction.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at jeddins@achp.gov.

Sincerely,

Reid J. Nelson
Director
Office of Federal Agency Programs

ATTACHMENT 13

EXHIBIT 50

ADVISORY COUNCIL ON HISTORIC PRESERVATION
ACHP

Preserving America's Heritage

August 1, 2016

Mr. David B. Olson
U.S. Army Corps of Engineers
Attn: CECW–CO–R
441 G Street NW.
Washington, DC 20314–1000

Ref: *Proposal to Reissue and Modify Nationwide Permits, Docket Number COE–2015–0017 and/or RIN 0710–AA73*

Dear Mr. Olsen:

The Advisory Council on Historic Preservation (ACHP) has reviewed the *Proposal to Reissue and Modify Nationwide Permits*, which was published by the U. S. Army Corps of Engineers (Corps) in the Federal Register on Wednesday, June 1, 2016, and this letter transmits our overall concerns about the proposal. Our comments reiterate those provided in our letter of February 12, 2016, to Mr. Vladik Dorjets, Office of Management and Budget, and repeats concerns ACHP has expressed previously during earlier renewals in 2006 and 2011. Our comments are focused on General Condition (GC) 20; which outlines the process to be used by prospective permittees to ensure Corps compliance with Section 106 of the National Historic Preservation Act (NHPA)(54 U.S.C. § 300101 et seq; GC 21, which provides requirements for applicants who encounter previously unidentified archaeological remains; and GC 32, which deals with Pre-Construction Notification (PCN). Through these comments we address a number of fundamental concerns with the NWP program in general.

(1) Reliance on "counterpart" regulations to 36 C.F.R. part 800 that do not fulfill the requirements of Section 106 and have not been approved by the ACHP

The ACHP acknowledges that the Corps does not directly reference Appendix C - *Procedures for the Protection of Historic Properties* of 33 C.F.R. part 325, Processing of Department of the Army Permits (Appendix C), in the current Proposal to Reissue and Modify Nationwide Permits (NWPs). However, paragraph (c) of GC 20 of the revised NWPs specifies that:

"When reviewing pre-construction notifications (PCNs), district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act."

It is our understanding that the term "current procedures", as used here, refers to the Corps Regulatory Program's current procedures for Section 106 compliance, which include Appendix C, the revised interim guidance for implementing Appendix C with the ACHP's revised regulations at 36 C.F.R. part 800 (April 25, 2005), and other guidance issued by the Corps for Section 106 compliance. Although specific reference to Appendix C has been removed, this General Condition links compliance with NHPA to the permittees' compliance with the Corps' current guidance, which still includes the provisions of 33 C.F.R.

ADVISORY COUNCIL ON HISTORIC PRESERVATION
401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

Part 325, Appendix C. Appendix C is not approved by the ACHP as a program alternative, as required by 36 C.F.R. § 800.14. Therefore, the ACHP considers Appendix C as an internal Corps process that does not fulfill the requirements of Section 106 of NHPA, which has been supported by court opinions (e.g., Committee to Save Cleveland's Huletts, et al., v U.S. Army Corps of Engineers, et al.). By referencing guidance that includes Appendix C, the Corps suggests to prospective permittees that compliance with the Corps' current guidance fulfills its Section 106 responsibilities under NHPA.

(2) Corps' failure to comply with Section 106 for issuance of the NWPs

Corps districts have stated that they comply with the requirements of Section 106 for issuance of the NWPs when they are reissued. This position suggests that the public and agency notices, along with comments submitted on the draft NWPs and final NWPs, constitute compliance with Section 106. The Corps districts also suggest that the requirements set forth in GC 20, 21, and 32, adequately comply with Section 106 so that the protocols they propose for review and issuance of NWPs that require limited Section 106 coordination/consultation in the review of permits is justified. However, reliance on GC 20, 21, and 32 is not a substitute for compliance with Section 106 in individual cases, particularly as currently drafted. In the absence of a Section 106 review process that is carried out prior to reissuance of the NWPs, the Corps fails to meet the requirements of 36 C.F.R. part 800.

We would also note that GC 32, paragraph (d)(3) requires a State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) to respond in ten (10) days to an initial Corps notification regarding a proposed NWP for an undertaking. In the Section 106 implementing regulations, there are timing requirements for SHPO/THPO response to formal agency findings regarding effects to historic properties that may result from a proposed undertaking. However, there is no timing requirement for a response to an agency's initiation of the Section 106 process. As such, the Corps cannot unilaterally impose these timelines on SHPOs/THPOs, or any other consulting parties, without having developed an approved program alternative that is consistent with the provisions of 36 C.F.R. § 800.14. Further, this section of GC 32 should make clear that consultation to identify historic properties, assess effects, and resolve any adverse effects with SHPOs/THPOs and other consulting parties **is not** limited to the fifteen day (15-day) time period specified for a decision on the PCN. A decision on the NWP would not be provided until the Corps has completed its Section 106 responsibilities for each proposed undertaking.

(3) Lack of clarity about who is responsible for identification and evaluation of historic properties and determination of effects when a non-federal permittee seeks to use a NWP

The wording of GC 20 and GC 32 do not clearly specify who is responsible for determining whether or not historic properties may be affected by a permitted activity. In situations where the NWP does not automatically require a pre-construction notification, the burden is placed solely on the permittee to determine if the proposed activity will have an effect on historic properties. No guidance is provided to explain to the applicant what "potential to cause effects to any historic property" means. Nor is a mechanism for oversight of such determinations by the Corps detailed.

These provisions create confusion about who is responsible for determining whether historic properties are present within the undertaking's Area of Potential Effects (APE) and how they may be affected. Likewise, there is confusion about the nature and scope of the appropriate identification effort and associated consultation, including consultation with Indian tribes required by Section 106 and its implementing regulations. GC 20 appears to grant permittees the authority to act as the federal agency and determine whether an undertaking has the potential to have an effect on historic properties. It also appears to give permittees the authority to make determinations of eligibility and findings of effect based on the permittees' decision about whether the permitted activity may or may not have an effect on historic properties. (See also GC 32(b)(8)).

(4) Confusion about Corps' responsibilities for compliance with Section 106 when another federal agency is the applicant for a NWP

Paragraph b of GC 20 indicates that federal permittees should follow their own procedures for complying with the requirements of Section 106, and submit to the DE appropriate documentation to demonstrate compliance with Section 106. The DE reviews the documentation and determines whether it is sufficient to address Section 106 compliance for the NWP activity, or whether additional Section 106 consultation is necessary. However, this paragraph is unclear about whether the Corps will acknowledge its responsibility to comply with Section 106 for undertakings that require Corps permits, even when other federal agencies also have actions related to the undertaking that require compliance with Section 106.

If more than one federal agency has an action related to an undertaking, the Section 106 regulations allow some or all of the agencies to designate a lead federal agency that can act to fulfill their collective responsibilities under Section 106. Federal agencies that do not designate a lead federal agency remain individually responsible for their compliance with Section 106. The ACHP questions the appropriateness of the Corps' use of a general condition on NWPs to designate other federal agencies as lead agency for the purposes of Section 106. By using this approach, the Corps creates a lead agency designation without the agreement of the other agencies, and after the Section 106 compliance has already been completed.

(5) Inadequate consultation with tribes and failure to involve them in the timely identification of historic properties

The Corps' reliance on permittees, as outlined in GC 20 and GC 32, determines whether an undertaking requiring a Corps permit has the potential to have an effect on historic properties. Further, this arrangement often leads to the Corps' failure to adequately consult with federally recognized tribes regarding the identification of, and assessment of effects on, historic properties of religious and cultural significance to them that may be affected by the undertaking. The Corps is aware that a federal agency is obligated to consult with federally recognized tribes regarding the potential presence of and effects to properties of religious and cultural significance to them in the Area of Potential Effects (APE) of undertakings, including parts that may require NWPs. In fulfilling this requirement, the Corps must keep in mind its government-to-government relationship with federally recognized tribes, and engage them in consultation early enough to inform the development of the scope of the effort to identify and evaluate historic properties that may be affected by the undertaking. Properties of religious and cultural significance to tribes are not limited to archaeological sites or properties only eligible under Criterion D, and may involve traditional cultural landscapes identified by the tribes.

(6) Segmentation of linear undertakings

The Section 106 regulations define the undertaking subject to Section 106 review as the project, portions of which may require federal authorization or assistance. The APE for an undertaking is the area within which the larger undertaking may affect historic properties, if any may be present. Linear undertakings often extend great distances and involve numerous crossings of Waters of the United States (WOUS) spread throughout the undertaking which are subject to the Corps Regulatory Program. The APE for such undertakings should include all areas where historic properties may be affected by the undertaking, directly and indirectly, if any are present.

However, the Corps most often treats the review of each of the water crossings along a linear undertaking as a separate undertaking. In doing so, the Corps is not differentiating between the federal action and the undertaking, in accordance with our regulations. Further, the Corps' minimization of its responsibility to take into account the effects of the larger undertaking on historic properties could result in the failure to carry out the four-step Section 106 process in a consistent and proper sequence. This may result in failure to involve consulting parties appropriately in the Section 106 consultation.

The ACHP acknowledges that at times, a federal agency may have limited jurisdiction over a small portion of a larger undertaking. However, in such cases, the federal agency remains responsible for considering the effects of the larger undertaking on historic properties beyond areas of its specific jurisdiction, and should consider the number and location of its areas of jurisdiction along the linear undertaking to gauge the level of effort required to identify historic properties and resolve adverse effects. The federal agency should also consider the degree of federal involvement in, and relationship to, the undertaking when it takes into account effects to historic properties related to the undertaking.

(7) Section 110(k) and Post Review Discoveries

We commend the Corps for its retention of Paragraph (e) of GC 20 informing prospective permittees about the requirements of Section 110(k) of the NHPA (54 U.S.C. 306113) regarding intentional adverse effects to historic properties. We also are pleased that the Corps retains GC 21 regarding the permittee's responsibilities related to discovery of previously unknown remains and artifacts. This general condition will assist permittees in avoiding effects to previously unidentified historic properties. However, GC21 lacks a requirement that is generally associated with discovery situations: the agency immediately stopping work in the area of the discovery until the Corps can determine the eligibility of the property, the nature of any effect, and any steps to resolve adverse effects. As the Corps is aware, most Section 106 agreement documents contain stipulations for post-review discovery that require cessation of work in the area of the discovery. These agreements also have provisions that specify time frames for notification of, and response by the Corps, SHPO/ THPO, and other consulting and interested parties. We, therefore, recommend that the Corps revise GC 21 to include similar provisions to avoid allowing unnecessary and unanticipated adverse effects on historic properties. We note that the current wording of GC 21 only allows for recovery activities or eligibility determinations, while failing to address other types of measures that might be determined necessary to avoid, minimize, or mitigate adverse effects to historic properties.

In closing, we are encouraged by recent discussions with the Corps aimed at resolving the differences between Appendix C and 36 C.F.R. part 800, and developing a program alternative pursuant to 36 C.F.R. § 800.14 consistent with the Section 106 regulations. We share the Corps' desire to make its permit review process efficient, consistent and transparent for its numerous applicants across the nation. To that end, the ACHP remains committed to working with the Corps to address the issues highlighted above, as well as to resolve the long standing differences between the Corps' Appendix C procedures and the Section 106 regulations (36 C.F.R. part 800).

If you have questions or wish to discuss the information in this letter further, please direct any response to Dr. John T. Eddins. He may be reached by email at jeddins@achp.gov or by telephone at 202-517-0211.

Sincerely,

For
Reid J. Nelson
Director
Office of Federal Agency Programs

ATTACHMENT 14

EXHIBIT 55

Preserving America's Heritage

April 18, 2011

Mr. David B. Olson
U.S. Army Corps of Engineers
Attn: CECW–CO–R
441 G Street, NW.
Washington, DC 20314–1000

Ref.: ***Proposal to Reissue and Modify Nationwide Permits, docket number COE–2010–0035 and/or ZRIN 0710–ZA05***

Dear Mr. Olsen:

The Advisory Council on Historic Preservation (ACHP) has reviewed the Proposal to Reissue and Modify Nationwide Permits, which was published in the Federal Register on Wednesday, February 16, 2011, by the U. S. Army Corps of Engineers (Corps). This letter transmits our comments and concerns about the current proposal which are primarily focused on General Condition (GC) 20 (formerly GC 18), which outlines the process to be used by prospective permittees to ensure Corps compliance with Section 106 of the National Historic Preservation Act (NHPA), and GC 30 (formerly GC 27), which deals with Pre-Construction Notification.

While we understand there will be another opportunity for the ACHP, as an affected federal agency, to provide input, we'd like to share with you the fundamental concerns we have with these general conditions. Specifically, we are concerned about: (1) Reliance on "counterpart" regulations to 36 CFR 800 that do not fulfill the requirements of Section 106 and have not been approved by the ACHP; and (2) lack of clarity about who is responsible for identification and evaluation of historic properties and determination of effects.

1) The Reliance on Unapproved "Counterpart" Regulations to 36 CFR 800

The ACHP applauds the Corps decision to refrain from directly referencing 33 CFR part 325, Appendix C in the revised Nationwide Permits (NWPs) and General Conditions. However, paragraph (c) of GC 20 of the revised NWPs specifies that:

> "When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act."

It is our understanding that the term "current procedures," as specified in the *Discussion of Proposed Modifications to Nationwide Permit General Conditions* on page 9185 of the Federal

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Register notice, refers to the Corps Regulatory Program's current procedures for section 106 compliance, which include Appendix C, the revised interim guidance for implementing Appendix C with the ACHP's revised regulations at 36 CFR part 800 (April 25, 2005), and other guidance issued by the Corps for section 106 compliance. Although specific reference to Appendix C has been avoided, this General Condition links compliance with NHPA to the permittees' compliance with the Corps' current guidance, which still includes the provisions of 33 CFR Part 325, Appendix C. As you know, Appendix C has not been approved by the ACHP as a program alternative, as required by 36 CFR Part 800.14. The ACHP has advised the Corps that we consider Appendix C to be an unauthorized process that does not fulfill the requirements of Section 106 of the NHPA. This position is supported by court opinions (e.g., Committee to Save Cleveland's Huletts, et al., v U.S. Army Corps of Engineers, et al.). We believe that the Corps, in referencing guidance that includes Appendix C, provides prospective permittees unwarranted assurances that compliance with the Corps' current guidance fulfills the requirements of Section 106.

(2) Responsibility for identification and evaluation of historic properties and determination of effects.

The wording of GC 20 and GC 30, taken together, does not clearly indicate who is responsible for determining whether historic properties may be affected by a permitted activity. In situations where the desired NWP does not automatically require a pre-construction notification, the burden is placed solely on the permittee to determine if the proposed activity will affect an historic property. Paragraph (c) of GC 20 indicates that:

> "Non-Federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties."

Paragraph (c) also indicates that, after receiving a pre-construction notification:

> "The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties."

These provisions create confusion about who is responsible for determining whether historic properties are present within the undertaking's Area of Potential Effect (APE) and how they may be affected, as well as confusion about the nature and scope of the appropriate identification effort and associated consultation that should be carried out under Section 106 and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800). GC 20 appears to grant permittees the authority to make "effect determinations" and determinations of eligibility, based on the permittee's belief that the permitted activity may have an effect on historic properties. It is questionable why the permittee would decide whether the Corps needs to comply with Section 106. Under the ACHP's regulations, federal permit applicants can initiate the Section 106 process with other consulting parties, and assist the Corps in gathering information to be used in the Section 106 process; however, they cannot be responsible for making determinations and findings, which remain the legal responsibility of the agency.

Our concerns with GC 30 are similar to those expressed for GC 20, and focus specifically on when a Pre-Construction Notification is required, thus triggering more intensive Corps evaluation of the potential for the presence of historic properties. We consider these to be major issues for the Corps regulatory process, which includes the proposed revised and reissued NWPs.

We commend the Corps for its retention of Paragraph (e) of GC 20 informing prospective permittees about the requirements of section 110k of the NHPA (16 U.S.C. 470h–2(k)) regarding intentional adverse effects to historic properties. Likewise, the addition of the new GC 14 regarding the permittee's responsibilities related to discovery of previously unknown remains and artifacts is appropriate as it will assist permittees in avoiding effects to previously unidentified historic properties. This should avoid project delays and allow the Corps to comply with Section 106 in a timely manner.

The ACHP appreciates the thoughtful consideration the Corps has given to our letter of November 27, 2006, regarding the current NWPs prior to their publication in March of 2007. We hope that the resulting revisions in the NWPs and GCs have helped the Corps to take into account the effects of its permitting actions on historic properties, and enabled permit applicants to better assist the Corps in complying with Section 106. The comments included in this letter should be considered likewise.

The most recent discussions between the Corps and the ACHP to resolve the differences between the Corps' Appendix C procedures for complying with Section 106 of the NHPA and the ACHP's regulations at 36 CFR 800 unfortunately did not result in agreement. We continue to believe that a resolution of our differences would greatly assist the Corps in its goals for the NWPs to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources and insuring minimal direct and cumulative adverse effects. The ACHP remains ready to further explore with the Corps a resolution to the differences between Appendix C and our regulations.

If you have questions or wish to discuss the concerns noted above, please direct any response to Dr. John T. Eddins. He may be reached by email at jeddins@achp.gov or by telephone at 202-606-8553.

Sincerely,

Reid J. Nelson
Director
Office of Federal Agency Programs

ATTACHMENT 15

DATE: July 7, 2016

SUBJECT: McCullor's Review of DAPL's Cultural Resource Survey Report for MFR.

I, Matt McCullor, received a copy of DAPL's Cultural Resource Survey Report the week prior to the TDY in Sioux Falls, SD concerning the DAPL project (25 Jan 16. Since receipt of the report covering areas within the Omaha District, and a week after the Sioux Falls Consultation meeting, I reviewed the report. I received access to other portions of the report from DAPL and performed a quick review of those portions.

The reports for the Omaha District titled "Level III Intensive Cultural Resources Survey for Dakota Access Pipeline Project for Campbell, McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner, and Lincoln Counties, South Dakota" and "Dakota Access, LLC Dakota Access Pipeline Project (ND) 2014 Dakota Access Class II/III Cultural Resources Inventory." During review of reports, nothing drew my attention except the crossing of the James River (PCN 4). No crossings would cause affects to Historic Properties, except for the crossing of the James River.

From time to time, I reviewed the report that covered the Omaha District. These reviews were to remind myself of the findings at each PCN and to understand the areas the Upper Sioux Community would be surveying.

In summary, I reviewed all the report sections I had access to that concerned river crossings (both PCN and non-PCN crossings) for the DAPL Project, especially the areas in the Omaha District. No Non-PCN crossing caused concerns about affects to Historic Properties.